Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Martin E. Bruetman,
Petitioner,

v.

Diego J. Herbstein,
Respondent.

On Petition for Stay to
United Stated Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Martin E. Bruetman, *Pro Se*
77 W. Huron St. #214
Chicago, Illinois 60610
(312) 944-0782

Balmar Legal Publishing, Falls Church, VA (703) 289-9000

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QUESTIONS PRESENTED

Whether the District Court and the Court of Appeals failed to conduct a *de novo* review of the questions of law raised on appeal regarding the elements of collateral estoppel and the question of punitive damages determined by the Bankruptcy Court in a motion for summary judgment, as required by well-established principles of appellate jurisprudence recognized by the Courts of Appeals and the Supreme Court *Salve Regina College .v. Russell,* 111 S. Ct. 1217 (1991): When a *de novo review* is compelled, no form of appellate deference is acceptable;" and with *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 121 S. Ct. 1678 (2001): "when the issue of constitutionality and in particular regarding punitive damages the standard is *de novo* review."

Whether the District Court and the Court of Appeals erred when they upheld the opinion of the Bankruptcy Court that there was no genuine issue of material fact on summary judgment where the facts in question asserted by the plaintiff movant were beyond the knowledge of the affiant and not otherwise supported, and the sworn counter assertions of fact made by the defendant non-movant were not denied by the movant and were admitted by operation of law. Rule 56 (c) and (e) of the Federal Rules of Civil Procedure, Circuit Rules Rule 56.1, *Celotex Corp, v. Catrett,* U.S. 317, 323, 106 S. Ct 2548, 2552,

Whether the District Court and the Court of Appeals erred when they upheld the determination by the Bankruptcy Court that issues otherwise non litigated in the trial court had been "actually litigated" and were essential to the final judgment for collateral estoppel purposes because the default judgment entered by the trial court had the effect of establishing the liability of the defendant, which has *res judicata* but not issue preclusion effect and is not applicable in bankruptcy discharge proceedings.

The case at bar involves two conflicting judgments on the same issues, rendered by two courts from different jurisdictions. One is a default judgment entered by the New York District Court, the other is a judgment on the merits entered by the judicial authority of Argentina. The litigations have run concurrently, pursuant to the *Colorado River* doctrine. Whether the District Court and the Court of Appeals erred when they upheld the decision of the Bankruptcy Court, which refused to follow the Last in Time principle. *Dimock v. Revere Copper Co.,* 117 U.S. 559(1886) *Treines v. Sunshine Mining Co.* 308 U.S. 66(1939); *Morris v. Jones* 329 U.S. (1947).

Whether the District Court and the Court of Appeals erred when they upheld the opinion of the Bankruptcy Court that the Restatement of Judgments had greater legal authority than the Supreme Court opinions and an Illinois statute.

Whether the District Court and the Court of Appeals erred when they upheld the decision of the Bankruptcy Court not to allow the Petitioner's cross motion for summary judgment to be fully briefed, thereby arbitrarily applying different legal standards to similarly situated individuals in violation of the equal protection of the law and the due process of law, *U.S.C. Const. Amend. 14;_Smith on behalf of Smith v. Severn,* 129 F.3d 419 (7th Cir. 1997).

Whether the District Court and the Court of Appeals erred when they upheld the decision of the Bankruptcy Court in which that court agreed with the assertion of the plaintiff summary judgment movant that the non-movant party, a United States citizen of Argentinean origin, should not be allowed to seek the protection of the "courts of this country rather than his own country because it is contrary to law", thereby denying defendant the equal protection of the law in violation of Section I of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner

Martin E. Bruetman (Bruetman) is a U.S. citizen who is a neurologist, sixty nine years old who has resided in the United States since 1958 and in Chicago, Illinois since 1968 except for brief periods of time when he resided in Argentina for scientific and professional reasons.

Bruetman was the Defendant in the New York Proceeding, the Bankruptcy Court Adversary Proceeding and the Appellant in the District Court and the Seventh Circuit Court of Appeals.

Respondent

Diego Herbstein (Herbstein) is a physician with residency in New York. Herbstein and Bruetman were involved in Argentina in the development of a Medical Center. Herbstein was the Plaintiff in the New York Proceeding, the Bankruptcy Court Adversary Proceeding and the Appellee in the District Court and the Seventh Circuit. There are not corporate parties.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgments and opinions of the Seventh Circuit Court of Appeals docket number 01-3583 and the Courts below.

Although the present Petition, although involves the same parties and originates in the same proceedings as Petition 02-4, the issues of law are substantively different and do not relate to each other. Neither the Seventh Circuit nor the District Court have consolidated the cases.

Opinions of Courts Below

The Unpublished Order by the United States Court of Appeals for the Seventh Circuit entered on April 5, 2002, denying Appellant's Appeal is set forth in the Appendix hereto[1] (A1)

The Order by the United States Court of Appeals for the Seventh Circuit which denied a timely filed Petition for Rehearing En Banc, entered on April 30, 2002, is set forth in the Appendix hereto. (A3)

The Order by the United States Court of Appeals denying the Motion to Stay the Mandate on May 8, 2002, is set forth in the Appendix hereto. (A4)

The Order by the District Court for the Northern District of Illinois, Eastern Division, entered on September 6, 2001, affirming the Opinion-Order rendered by the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, denying Dischargeabilty on Counts I and II of the Amended Adversary Complaint, is reported at *In Re Bruetman*, 266 B.R. 676 (N. D. Ill. 2001) and is set forth in the Appendix hereto (A5)

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[1] The footnote in the order "related appeal" misstates the matter. The issue was an appeal from a different District Court order. The Court of Appeals entered its opinion on February 21, 2001 and the Bankruptcy Court entered the final opinion on March 8, 2001.

The Memorandum Opinion by the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, entered on March 8, 2001, excepting from discharge Counts I and II of the Amended Adversary Complaint, is reported at *In Re Bruetman*, 259 B.R. 649 (Bank. N.D. Ill.2001), is set forth in the Appendix hereto. (A20)

The Default Judgment by the United States District Court for the Southern District of New York entered on August 10, 1992, is set forth in the Appendix hereto. (A56)

Jurisdictional Statement

The jurisdiction of the District Court for Northern District of Illinois was invoked pursuant to Fed. R. Civ. P. 69 (a).

The jurisdiction of the United States Bankruptcy Court for the Northern District of Illinois was invoked pursuant to 28 U.S.C. section 1334(b).

The Jurisdiction of the United States Court of Appeals was invoked pursuant to 28 U.S.C. section 1291.

The United States Supreme Court jurisdiction is pursuant to 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

28 U.S.C. 1954 (1); 28 U.S.C Sec. 1291; 28 U.S.C. 1334(b); Fed. R. Civ. P. 56 (c) and (e); Circuit Rules 56.1(b)(3) (Bk.402N); 56.1(a)(3) (Bk.402M); 56(b)(3)(B); 11 U.S.C 523, 11 U.S.C 727; Restatement (third) of Foreign Relations Law of the U. States (1982) Sec. 482(2)(e); IL.ST.CH. 735 Sec.5/12 619-620. Rule 201 Federal Rules of Evidence. United States Constitution Fourteenth Amendment.

Statement of the Case

The present matter is a multi-litigation multi-jurisdictional case between the parties which began in 1989 in Argentina, in the Criminal Division Federal Justice of Argentina, case # 89-51761, Bruetman as the plaintiff, and in the Commercial Division of the Civil Courts of Argentina, case number 18109/89, Herbstein as the Plaintiff.

Litigation in the U.S. against Bruetman and others was brought by Herbstein as plaintiff, in the United States District Court for the Southern District of New York, in the case captioned "*Diego J. Herbstein v. Martin E. Bruetman, et al.*," case number 89 Civ 6864, several months after filing the same complaint in Argentina, which was in advance stage of discovery. A default judgment was entered against the defendant and others ordering the plaintiff to recover the sum $2,737,924.40 with interest as provided by law, and costs. (App. A 57) It was registered in the United States District Court for the Northern District of Illinois, Eastern Division, as case number 92 C 7948, pursuant to Rule 69 (b) of the Fed. R. Civ. P. Plaintiff began discovery proceedings in January 1993.

Defendant's counsel on July 23, 1992, respectfully informed Judge Sweet that Defendants for reasons that were totally beyond their control "could not comply" with the order to produce "certified" financial statements as requested by Herbstein, which the Court prior to entering the default judgment described as a collateral issue on discovery. *Herbstein v. Bruetman*, 799 F. Supp. 1450 *1457. (1992). See also page 17 below.

The Supplementary Proceedings

Herbstein on December 4, 1992 commenced supplementary proceedings to enforce the New York judgment. Mrs. Bruetman was deposed once, in June 1993 and the Court terminated her deposition in September 1993. *See* Petition Writ of Certiorari 02-4.

On June 25, 1999, pursuant to 11 U.S.C. 523 (a) and 727 Herbstein filed an Adversary Complaint to determine dischargeabilty and to deny discharge. (R. 99 A 00811, Docket # 1).

On July 8, 1999, the Bankruptcy Court entered an order discharging Bruetman pursuant to 11 U.S.C. 727. Creditors and all parties were served on July 9, 1999. See Petition Writ of Certiorari 02-4. On August 27, 1999, the Bankruptcy Court struck the Adversary Complaint ordering to refile it by September 24, 1999. (R. 99A811 Dock. # 14.)

On October 4, 1999, Herbstein filed a five-count Amended Adversary Complaint, Counts I & II under 11 U.S.C. 523 (a) and III, IV & V under 11 U.S.C 727. (R. 99A811 Dock. # 21.) Plaintiff supported the late filing: "while counsel was generally familiar with those proceedings, the Plaintiff initially retained him long after that judgment [false] in that case and only to collect the judgment and not to review the complex facts underlying it."[2]

On December 8, 1999, Herbstein filed a 47 pages motion for summary judgment on count I and II of the Amended Complaint.

On February 25, 2000, Bruetman filed a cross motion for summary judgment.

On March 8, 2001, the Bankruptcy Court granted Herbstein's Motion for Summary Judgment on Counts I & II of the Amended Adversary Complaint, and denied Bruetman's Cross Motion for Summary Judgment. (A 20).

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[2] Counsel was retained before the New York case was closed. Counsel filed the Adversary Complaint without reviewing the "complex" case despite the 90 days time lag between Bankruptcy filing and Adversary Complaint filing and the F. Rules B. P 4004 (b) that allows for an extension of time if requested. The pleading falls within the provisions of Rule 11 F. R. Civ. P.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decisions by the District Court and the Court of Appeals conflict with opinions of the Supreme Court and Courts of Appeals, Statutes, and Policies.

The District Court's Prejudice

The District Court before reviewing any pleadings, it decided that Plaintiff had the right to execute the judgment and denied a motion to stay the enforcement for the following reasons: "The underlying judgment being a civil RICO is not dischargeable in bankruptcy", "that the principle is inviolate one" and "the claim was reduced to judgment", "that default judgments are damn good". "Are as good as the other ones when the circumstances are presented", "the court will not grant relief prior to reviewing the underlying stuff", and "will not grant relief on the basis that you are going to win because I am not convinced you will win". The claim was not reduced to judgment as the District Court asserts; only a default judgment had been entered. The District Court reaffirmed its position on a motion to reconsider that raised the point of prejudice of the Court and it was issuing a ruling that was not according to judicial precedent within its jurisdiction, which required conducting a *de novo* review. (Tr. Hearing 7/9/ & 7/11/01) It is not necessary for the Court to delve into the merits of the underlying issues to render an opinion regarding a stay pending appeal. *In Re Mader*, 100 B.R. 989 (N.D. Ill Western Div., 1989). In layman terms the Court ruling said: I have already made up my mind; do not confuse me with facts.

Failure to Follow the *De Novo* Standard

Independent review is necessary if appellate courts are to maintain control, and clarify legal principles; and *de novo* review tends to unify precedent to stabilize the law. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct.

1678 (2001) "When a *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991). The case at bar involves the adjudication, of punitive treble damages by inference drawn *sua sponte* by a Bankruptcy Court, not by the trial Court, on a summary judgment motion. In Cooper Industries, Inc. as to the issue of constitutionality particularly regarding punitive damages; this Court held that the *de novo* review standard applies. Justice Scalia concurring (*1689, *1690) changed his previous standing on the issue, and "agreed that the *de novo* review of the question of excessive punitive damages best accord with our jurisprudence."

In its opinion the District Court (A9-10) lists the issues of law raised by Bruetman, and makes a declaratory statement that a *de novo* standard was observed. (A10). In the next paragraph the court states: "We are not in the business of determining what impressions emerge from the Bankruptcy Court's opinion, however. Rather, our task is to determine whether alleged inaccuracies and mischaracterizations constitute clearly erroneous findings of fact."[3] (A11) This is not what *de novo* standard means. The District Court opinion mostly transcribes verbatim paragraphs from the Bankruptcy Court opinion, which is unsupported by the New York judgment and/or records before the court. There is not a review of the raised issues of law. The description of legal events in section "Background" is incorrect (A6). The District Court also accepts as fact plaintiff's unproven allegations in the Bankruptcy Proceedings. What is critical is not the form but the process that the court uses in reviewing the bankruptcy's court's opinion. *Moody v. Amoco Oil Co.,* 734 F.2d 1200, 1210 (7th. Cir.) *cert. Denied,* 469 U.S. 982, 105 S. Ct 386, 83 L.Ed.2d 321 (1984). The District Court failed both, the form and the process.

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[3] Page 2 District Court opinion is incorrect, " who solicited who" is in dispute. Memorandum of law @2 Bk.Dock.#100).Page 3; Herbstein did not file the Criminal Complaint in Argentina.

Financial Statements (Materiality)

The District Court opinion in the Section "Background" states, in October 1991, the New York Court granted a discovery order on the financial condition of defendants (A7). "The information was relevant to the punitive damages Herbstein planned to pursue at trial". "Bruetman did not comply" with the court's order. The District Court erred. The New York court entered a revised protective order in favor of the defendants on December 12, 1991. Bruetman and another defendant, High Tech, provided Herbstein's counsel with statements of their current financial condition by letter dated January 15, 1992. (A63 par. 37), and on June 19, 1992, the court entered an order sealing and impounding the affidavits and financial statements (N. York dock. @115) (A64 par. 41). The New York Court states only that the Defendants failed to comply "fully." *Herbstein v. Bruetman*, 799 F. Supp. 1450 *1457 (1992).

The Order issued by the New York Court on July 17, 1992, was addressed to all defendants, not only to Bruetman. (N. York dock. No. 118). Defendant's Counsel's letter of July 23, 1992, was on behalf of all Defendants, it relates to the demand for "certified" audits, although the July 17, 1992, order states "affidavits." (N.Y. dock. 117). The Argentinean Courts already had denied Herbstein's motion for Alta Tecnologia statements. Further, Alta Tecnologia never accepted the New York jurisdiction. (Gorostiza affidavit Pars. 10, 11, 12)

District Court Summary Legal Issues

The District Court opinion (A10) summarizes Bruetman's Appeal in three general categories. (1) "Errors in identifying genuine issue of material fact and applying standard for motions for summary judgment." (2) Errors in applying the collateral estoppel doctrine (3) Errors in determining the effect if any of the Argentinean litigation.

Summary Judgment Motion Elements Have Not Been Met

Undisputed Facts. Failure to observe Rule 56 of the Fed. Rules Civ. P. and Circuit Rule 56.1

When reviewing a Motion for Summary Judgment the reviewing court should ascertain the compliance with Rule 56 of the F.R. Civ. P. The District Court's only feeble attempt is part of a footnote relying on a statement by the Bankruptcy Court. The difference between a rule of deference and the duty to exercise independent review "is much more than a matter of degree" *Bose Corporation v. Consumers Union of United States, Inc.,* 466 U.S. at 501, 104 S. Ct. 1949, at 1959, 80 L. Ed. 2d 502 (1984).

The Bankruptcy Court opinion contains a misleading subsection, *Undisputed Facts.* (A 22 to 30) It covers a compilation of allegations that the opinion characterizes as "facts," which do not fall into the category of undisputed facts within the meaning of Rule 56 of the Federal Rules of Civil Procedure. "Although the bankruptcy court's Memorandum of Decision contains a section titled "Findings of Fact," this court does not consider the statements made there to be findings in reference to disputed facts but, instead, to be merely a recitation of facts that were assumed by the court to be true for purposes of its ruling--indeed, summary judgment may be granted only where there is no genuine issue of material fact. Thus, the clearly erroneous standard ordinarily applied to findings of fact has no application here." *Smoker v. Hill & Associates*, Inc., 204 B.R. 900 (N.D. Indiana 1997). The description matches the case at bar.

The District Court: "Specifically, the Bankruptcy Court noted that Dr. Bruetman filed in response to Herbstein's motion for Summary Judgment a Rule 402 N statement that did not contest the facts and proceedings shown in the Southern District of New York case." The District Court opinion (A9 (FN)) is wrong. (Bruetman's 402 N statement 99A00811 Dock. # 65 to 69) (A58-64).

The Motion for Summary Judgment was on the Amended Adversary Complaint,[4] which unlike the original adversary complaint did not plead the New York Complaint as the basis for the claim. The Bankruptcy Court erroneously switches back and forth between the New York Complaint and the Amended Adversary Complaint, supporting his opinion with the allegations contained in the original stricken motion, but precluding defendant, (A 22; 36) from support its defense by challenging the "litigation" allegations of those on which the court relied, although the New York allegations were attached to the summary judgment motion. In doing so the Bankruptcy Court violated Bruetman due process of law. The District Court upheld the Bankruptcy Court opinion regarding the Argentinean litigation, which is an obvious afterthought by the Bankruptcy Court. The Bankruptcy Court considered the motion "factually inadequate" before reviewing it. The schedules for briefs are set at the time of filing like it was set for Herbstein. (A22)

Rule 56 of Fed. R. Civ. P. and certain local rules set the standard for summary judgment proceeding. Circuit Rule 56.1 (b) (3) refers to the non-moving party.

> "All material facts set forth in the statement filed pursuant to section (b)(3)(B) [Bk. 402N] will be deemed admitted unless controverted by the statement of the moving party."

Respondent, the moving party, failed to answer and/or contest the new additional genuine material issues of fact submitted by non-moving party. Pursuant to C.R. 56 (b)(3)(B) they are deemed to be admitted.[5] The moving party bears the burden of demonstrating absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986). The Summary Judgment motion is fatally defective, because there was no absence of disputed material genuine issue of fact. The Courts below opinion conflict with the Federal Rules of Civil Procedure, Courts of Appeals and Supreme Court opinions. *Popovitz v. Circuit City Stores, Inc.*, 185 F. 3d 726, 731 (7th Cir.1999). *Hunter v. Bryant*, 112 S. Ct. 534*539 (1991).

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[4] Civil RICO is not pleaded in the Amended Adversary Complaint.

[5] They meet *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 *248 (1986) requirements regarding materiality.

The Bankruptcy Court describes all the reasons why default judgments generally lack preclusive effect and its opinion provides the best argument for denying the motion for summary judgment. The Bankruptcy Court: "The District Judge in the New York case did not enter either Finding of Fact or Conclusion of Law." (A39) "While that the Default Judgment did not expressly indicate on its face the manner in which the judgment was calculated, from review of the judgment amount requested by Plaintiff in the Final Pre Trial Order and supporting materials presented here by plaintiff in which he demonstrates how the New York judgment was calculated, it is clear that treble damages were awarded." (A40) The District Court failed to properly review the Bankruptcy Court opinion.

Plaintiff's affidavit is defective. The Statements are not of his own knowledge, (F.R. Civ. P. 56 (e)) and they have been contested in Bruetman's 402N statement. It is a material error of law upheld by the District Court. By reading A 59-64 any well-informed outsider would have concluded that there are disputed material genuine issues of fact. The District Court (A9 (FN)) approved the Bankruptcy Court opinion that Bruetman's sworn counter statement of facts "did not contest the facts and proceedings shown in the Southern District of New York." It is not clear whether the lower courts meant that, in the New York proceedings, Bruetman did not contest the facts and proceedings, or that, in the motion for summary judgment in the Bankruptcy Court, Bruetman did not contest plaintiff's assertions as to the facts and proceedings of the New York litigation. Neither meaning is correct. First, the record establishes that Bruetman vigorously contested all facts asserted and all proceedings in the New York litigation, and the New York court recognized that all issues were disputed and have not been resolved. Thus, whether Bruetman contested the facts and proceedings in New York was a disputed issue of fact on summary judgment in the Bankruptcy Court. Second, in the summary judgment proceedings in the Bankruptcy Court, Bruetman contested the plaintiff's version of what occurred in the New York litigation for collateral estoppel purposes, so that the facts and proceedings of the New York litigation as asserted by plaintiff were also disputed issues of fact.

The Bankruptcy Court partially and selectively quotes the Final Pre Trial Orders, sec 6 (b) (A29-30) in which the total asked would have been $3,225,300.00 "plus costs and attorney's fees; punitive damages[6]; and interest," rather than $2,737,924.40 adjudged, with interest thereon as provided by law, and his costs of this action. (A58 par.11; A61 par. 16)

The Final Pre Trial Order states in Sec 2: "that no issue raised by the pleadings has been abandoned; in Sec.3 that the parties stipulated that no facts were not in dispute." "That the issues to be tried were formulated by the Court with consent and agreement of the parties."

The New York Court entered 10 issues to be determined at trial (N.Y. PTO @ 38-39, sec.8; A 62 Par. 26)) The Bankruptcy Court is legally and factually wrong by contradicting the New York Court. The preceding facts of record are in conflict with the District Court's footnote assertion. The New York pleadings showed that nothing in that litigation was determined and that no damages had been awarded. Other parts of the summary judgment material clearly showed that the plaintiff's assertions as to what occurred in the New York litigation are also disputed, precluding the entry of summary judgment.(Herbstein's 402

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[6] Treble damages are punitive damages. Further Herbstein's counsel affidavit states that they did forgive punitive damages. 99A00811 Dock #.54

M statement). *Herbstein v. Bruetman,* 799 F. Supp. 1450 (1992) (A62-63 Pars. 26; 27; 31; 37). The pleadings clearly showed disputed material issues of fact. Further, the Courts below upheld Herbstein's statement as part of his defective response to Bruetman's 402 N statement that states, "He [Bruetman] seeks the protection of the courts of this country from his own country. This deserves no countenance, and it is contrary to law." (99A00822 Dock. # 71) Such statement should not be part of Herbstein's response and it is a violation of the equal protection under the law of section I Fourteenth Amendment when a Court, condones and lets it stand.

Punitive Damages

"Because Count I (the Racketeering Count) in the District Court Complaint was the only Count in that case in which treble damages were requested, the New York District Judge necessarily decided in Herbstein's favor on that Count." The District Court opinion (A17, 19) regarding the matter of punitive damages and treble damages concludes that the failure by Bruetman to comply with a Court order in New York related to discovery of financials is of material significance. The fallacy of such conclusion is readily seen by reviewing Section III "The Default Judgment" *Herbstein,* 799 F. Supp. 1450 * 1457 (S.D.N.Y.1992). The New York Court prior to denying Herbstein's default motion states, that the "discovery matter concerns a collateral matter." The Bankruptcy Court abused its discretion by rejecting Bruetman's counsel affidavit, which refers it as collateral matter as the New York District Judge defined it, by calling it a conclusory opinion of law by counsel. (A39). The District Court conclusion that it was a material matter is in conflict with *Cooper Industries* and *Storck USA v. Levy*, 1991 WL 60566 (N. D. Ill.).

In order for plaintiff to recover punitive damages against the defendant [s], the plaintiff must prove by clear and convincing evidence that the defendants [s have] shown wanton disregard. *Honda Motor Co., Ltd. v. Oberg,* 114 S. Ct 2331 (1994). From Judge Posner opinion in *Kemezi v. Peters,* 79 F. 3d 33 *35-36 (7th Cir. 1996) one may be led to conclude that the wealth of an individual may be of relative value and the drawback is that may throw defendants into bankruptcy. In *Storck USA* the Court concludes that the financial information sought is relevant to the issue of punitive damages, but at the time of prove up the punitive damages. The Courts below erred in their conclusions on the issue of the punitive damages. Further, the Bankruptcy Court (A38) fails to cite any Seventh Circuit opinion on the matter, which conflicts with the opinions cited by the Bankruptcy Court. "When there is controlling authority within this circuit, it must be cited" *Tyson v. Jones & Laughlin Steel Corp.* 958 F. 2d 756, *762 (7th Cir. 1992).

Prove Up Requirements of Damages Have Not Been Met

Damages must be proved, unless they are liquidated or capable of calculation. *Merril Lynch Mortgage Co. v. Narayan,* 909 F.2d 246, 252 (7th Cir. 1990); *Young v. Hardin,* 37 F. 3d 282 (7th Cir. 1994) Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof. *Klapprott v. U.S.,* 69 S. Ct.384 *611, 612 (1949). Damages "must be proved in order to be recovered, a plaintiff who wants substantial damages can't just ask for them" *Accord Knapp v. Eagle Property Management Corp.,* 54 F.3d 1272 *1281 (7th Cir. 1995). The New York case was not subject to a prove up proceeding, either by affidavit and/or hearing. Even the Bankruptcy Court admitted that there was not certainty regarding the damages. (A39-40). To award punitive damages, it first must be considered whether the plaintiff is entitled to general damages. *Id. Honda.* It is beyond logic to allow punitive damages if the existence of damages is unknown. When liability is joint and several, entry of default judgment against fewer than all defendants is proper, but damages hearing may not be held until liability of each defendant has been resolved. *Dundee Cement Company v.*

Howard Pipe & Concrete Products, Inc., 722 F.2d 1319 (7th Cir. 1983).

Resolution of Litigation, Court Conclusion Is Not the Law

The District Court opinion (A11-12), converted to "facts," unsupported allegations by plaintiff, by the New York judgment or by the records, concluding, "Entry of the default judgment prevented the resolution of the litigation." This is not the law.

A default judgment establishes liability; the litigation is resolved but generally without collateral estoppel effect. If the District Court reasoning is accepted all default judgments prevent resolution of litigation.

Collateral Estoppel Doctrine Elements Have Not Been Met

After *Grogan v. Garner,* U.S. 279, 111 S. Ct. 654(1991) and *Brown v. Felsen,* 442 U.S. 127, 99 S. Ct.2205 collateral estoppel is the standard for Bankruptcy Courts in determining exceptions in dischargeabilty proceedings. Res Judicata is not the standard.

The Courts below have mistakenly held that Liability as established by a default judgment, rather than actual litigation has issue preclusion effect. To accept the Court conclusion is to accept that all default judgments, which by definition establish liability, would have issue preclusion effects, which is not the law for bankruptcy discharge proceedings. For collateral estoppel to apply, four elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action. *Klingman v. Levinson,* 831 F. 2d 1292, 1295 (7th

Cir. 1987). Three of the four elements required for applying the collateral estoppel have not been met[7].

The New York judgment (A56) has not determined any issue. In the New York proceeding no issues, facts, evidence, or contentions were agreed, consented to, stipulated, admitted, found, concluded, or submitted to the court for determination, adjudication, or decision at any time; no exhibits or deposition testimony was submitted to the court at any time, in connection with Herbstein's claims. (N.Y. docket PTO). (A63 par. 27). The Courts recognized that no issue was actually litigated (necessarily determined) (A39-40). Herbstein also accepts that the "actually litigated" issue is arguably. (Appellee brief, page 12)

Collateral Estoppel; Court's and Plaintiff's Cited Case Law is Incorrect

The Courts below abused their discretion trying to frame the case and force it within case law, from circuits other than the Seventh Circuit, which do not reflect the proceedings or the New York Court conclusions. *Id. Tyson* *762.

The District Court opinion (A17) circumscribes to adopt and transcribe almost verbatim Herbstein's cited case law from other circuits, (Memorandum of Law in support of Summary Judgment Motion, 99A00811 dock. 42, Appellee's Brief).

The first responsibility is to accurately inform courts of the law that applies to, and especially that governs, the issues in the case. Inaccuracies and omissions not only diminish counsel's and their clients' credibility and persuasiveness, they also disserve the bar, other litigants, and the interest of judicial efficiency in general because courts will be less willing to rely on the submissions of counsel in other cases. *Yund v. Covington Foods, Inc.*, 193 F.R. D. 582 *585. (S.D.

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[7] **Bruetman had legal representation the New York proceeding.**

Indiana 2000). This conclusion applies to counsel and in this case transcends counsel.

The Bankruptcy Court cited few cases (A37) from the Bankruptcy District of Northern Illinois. The records, allegations and the courts inferences do not support the inferences drawn by the courts below in the case at bar. The Bankruptcy Court misuses *Sims v. Landis,* 1997 Bank.Lexis 1214 (N.D. Ill 1997), which was "cited by Bruetman". (A40) The Court in *Sims* denied the motion for summary judgment to deny dischargeability.

The District Court supports his opinion quoting the same inappropriate case law as Herbstein. In *Wolstein v. Docteroff,* 133 F.3d 210 (3d Cir. 1997), the District Court opinion (A15) the debtor had "repeatedly and in bad faith refused to submit to properly noticed depositions or respond to numerous legitimate requests for the production of documents despite court orders and warnings."133 F.3d at 213, 215. The day that a hearing was to be held to determine damages, Docteroff filed for protection under Chapter 11 of the Code conceding that the court's order was to make him "liable as plead in the complaint." In *FDIC v. Daily (In re Daily),* 47 F.3d 365 (9th Cir. 1995), when the FDIC sought discovery in a prior RICO suit, the debtor failed to provide it. The Ninth Circuit explained that the district court had found that the debtor's failure to provide discovery "was the result of a deliberate, dilatory course of conduct", and that his "strategy of delay and evasiveness had significantly prejudiced the plaintiffs and had significantly interfered with the judicial process", "deliberately precluded" resolution of factual issues through normal adjudicative procedures" and the Kansas Court, which criminally convicted Daily, had issued findings of fact. 47 F.3d*368. Herbstein and the Court acknowledged that Bruetman participated fully in the discovery process and pretrial proceedings. Bruetman did nothing to thwart trial preparation. Indeed, it was Herbstein had not produced his three witnesses. There is plainly no similarity with the case at bar. Further, both cases were Chapter 11 rather than Chapter

7, and in both cases the discovery was related the merits not to the collateral issue of punitive damages. In *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319 (11th Cir. 1995), the district court allowed the counsel to withdraw from the case, Bush failed to appear for properly noticed depositions, never produced requested documents, failed to appear at a pretrial conference and he engaged in dilatory and deliberately obstructive conduct. 62 F.3d * 1321,* 1324. *In re Wien*, 155 B.R. 479 (Bankr. N.D.Ill. 1993), concerns an uncontested summary judgment. There is plainly no similarity to the facts here. In *Casey v. Transport Life Ins. Co. (In re Dorsey)*, 1993 WL 340928 (Bankr. N.D.Ill. 1993), the court entered a default judgment. 1993 WL at 1. The bankruptcy court denied a motion for summary judgment because the default judgment "simply declare judgment in favor of the Caseys and award a monetary amount". 1993 WL at 7. Thus, the Bankruptcy Court conclusion is undermined by its own citation.

Dundee and in *Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182 (7th Cir. 1982), were not bankruptcy court cases; and the rulings were issued regarding liability (res judicata); the defendants, who were served and filed an appearance, failed to file an answer or other responsive pleading or failed to respond to the complaint despite multiple opportunities given by the court. (A40)

Wording. Legal Meaning

In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) after a careful analysis of the meaning of wording as used in legal opinions, Justice Ginsburg concludes that "willful" without qualifying it, is not applicable to Bankruptcy dischargeabilty proceedings. The Bankruptcy Court referred to Bruetman's conduct as "refusal," while the New York default judgment stated, "defendants willfully failed." The Bankruptcy Court misuses *Kawaauhau*. It cited verbatim transcription of an excerpt from Herbstein's pleadings. (A41). The District Court Opinion (A11) errs when it equates the meaning of "would" to "could". The former indicates intention, the later implies inability. Though a motion to vacate a default judgment and the case at bar has differences as matter of law and facts some conclusions may be derived from case law. Defendants and Bruetman in particular, provided the financials accompanied by affidavits, but the reasons for failing to provide certified financial statements was not a "willful disregard for duties, simple carelessness or negligence" *Jones v. Phipps,* 39 F. 3d 158 (7th Cir.1994). The New York Court expressly understood the situation in *Herbstein v. Bruetman*, 799 F. Supp. 1450 (1992). The District Court has the discretion to manage its docket and also to enter default judgments. The New York Court did not abuse its discretion, but Herbstein misquoted the case law, and the Courts below followed, abusing their discretion by misapplying the meaning of "willful" and making synonyms of "would" and "could." The New York Court stated failed to comply "fully', which means a degree of completeness, not a full lack of compliance.

The Issues Sought to be Precluded Do Not Meet the Requirements of 523(a)(2)(a) and 523 (a)(4)

The Bankruptcy Court switches back and forth between the New York Complaint, the Pretrial Orders and the Amended Adversary Complaint. The Court (A36) wrongly states that Bruetman argues that the New York Complaint did not contain allegation of all elements of nodischargeabilty under 11 U.S.C. 523 (a)(2)(A). Bruetman contends that the Amended Adversary Complaint did not meet the requirements. Further, the Court lists 45 allegations contained in the New York Complaint, but not one determined as fact. One essential allegation also included par. 73 sect. 3 (b) of the Pretrial orders, which admitted that the contributions to the venture were used for the represented purpose. The Court citing *Field v. Mans,* 116 S.Ct.437 (1995) concludes justifiable reliance as one element necessary for granting an exception to discharge under Sect. 523 (a)(2)(A) has been met, (A34, 41). The kind of reliance that it is required in common law fraud claims vary with the jurisdiction. The level of reliance depends on sophistication of the parties, application of a subjective test based on intelligence and experience of the aggrieved person, the position of the parties, or experience and resourcefulness of relying party. *Field* *445. In Illinois justifiable reliance is required and must be shown by clear and convincing evidence. *Teamsters Local 282 Pension Trust Fund v. Angelos,* 839 F. 2d 366 (7th. Cir. 1988), *Cozzi Iron & Metal, Inc v. U.S. Office Equipment Inc.*, 250 F 3d.570 (7th Cir. 2001). Herbstein's lawyers organized and structured the business; his accountants were the external auditors. The same Bankruptcy Judge: a creditor who possesses access to the truth may be denied recovery of judgment of debt for dischargeability under Sec. 523 (a)(2)(A) for lack of justifiable reliance. *In Re Vernon*, 192 B.R.165 *172. Herbstein is a very sophisticated investor and speculator, with a vast business knowledge, real states ventures in the U. S., Paris, Buenos Aires, and Punta del Este (Uruguay), partnerships in medical imaging ventures in New York City, solicitation for finders fees to be deposited in Switzerland, without disclosing it to the limited partners; managing undisclosed banking accounts in Switzerland (Geneve), money laundering schemes in Argentina and the United States, failing to disclose the venture in his tax return. Bruetman became aware of the preceding activities too late (1989-1990). (Pretrial order Sec 4; 9-16; 24, 52, 53, 58, 60, 62; 81-84); Counterclaims (99A00811 dock. # 24) and transcripts of hearings. The Court in its opinion contradicts itself (A53-54) by recognizing that the Argentinean Courts dismissed the matter of including false financial statements and that Herbstein did not establish that Bruetman diverted funds. Title 11 Sec. 523 (a)(2)(A) and (A) (4) requirements have not been met. Herbstein failed to establish justifiable reliance.

In light of the above it may be concluded that the Bankruptcy Courts recognizing the implicit weakness of their arguments, decided to cite unfit case law to justify its wrong conclusions. The reviewing courts by failing to conduct a *de novo* review affirmed.

Courts Erred by Failing to Brief Cross Motion for Summary Judgment.

The Court permitted Herbstein's motion for summary judgment to be fully briefed, argued and heard; but Bruetman's motion, was denied that opportunity. An equal protection violation occurs when different legal standards are arbitrarily applied to similarly situated individuals. *U.S.C.A. Const. Amend. 14; Smith on behalf of Smith v. Severn,* 129 F. 3d 419 (7th Cir. 1985). "Full and fair opportunity to litigate the issue is determined by the due process of the Fourteenth Amendment, *Jones v. City of Alton, Ill.*, 757 F. 2d 878 (7th Cir. 1985)

When deciding cross motions for summary judgment, the standard is the same as that for individual motions and the court must consider each motion independent of the other. *Household Financial Services Inc. v Coastal Mortg. Services Inc.*, 152 F. Supp 2d 1015 (N..D. Ill. 2001). "When both parties seek summary judgment.... where, as here, we must asses the merits of each judgment motion independently" *Don Webster Co. Inc. v. Indiana Western Exp., Inc.,* 161 F. Supp 2d 939 (S. D. Indiana (2001). When deciding cross motions for summary judgment, the standard is the same as for individual motions for summary judgment, and the court must consider each motion independent of each other. *LDI Corp. v. Investor Group Leasing, Ltd.*, 1997 WL 733891 at *3 (N.D. Ill. 1997). The Bankruptcy Court correctly states (A22) that the cross motion is not treated as responsive to Herbstein's motion, since cross motions are not supposed to be offered as a responsive pleading. Then, it treats the Argentinean Courts opinion as responsive to Herbstein's 402 M statement.

Abuse of Discretion

Bruetman filed the cross motion for summary judgment on February 25, 2000, on March 7, 2000, the Bankruptcy Court struck the motion for reasons stated from the bench. (99A00811 Dock. # 73-90). The binding was not to the Court's liking, although the motion met all the requirements set by F.Rules Civ. P. 56 and C.R. 56.1. "No particular form of binding is required except that whatever method is used should be secured." Standing Order Regarding Motions for Summary Judgment. *Krause v. Alberto Culver Co.* 1999 WL 96015 (N.D.Ill.1999). The cross motion was refiled on March 21, 2000 (99A00811 Dock. 98-110). The Court abused its discretion by partially quoting facts (A55) when it says that the defendants appealed the decision of the Argentinean Lower Court but fails to state that Herbstein also appealed and that there were Appellate Court opinions rendered on the issues raised by Herbstein Appeal.

Petitioner Filed a Complete 402M (CR.1 (a)) Statement

The District Court erred in its opinion (A19). A cursory review of Petitioner's Cross Motion for Summary Judgment would have revealed a 27-page exhibit (99A00811 Dock. # 98-110) supported by independent certified translations of the Argentinean Trial Court Judgment and the Argentinean Court of Appeals Opinion. The Courts erred by not enforcing compliance with Rule 56 of F.R. Civ. P. and C. Rule 56.1. The Argentinean Courts provided a detailed discussion on the merits, on all the issues alleged in the Amended Adversary Complaint and New York complaint. Apropo of current times: The Argentinean Court of Appeals: "The Lower Court Judge said that both drafts are part of the Financial Books and Records but neither was signed" The Corporation would have sustained damages only if the Financial Statements had been approved." Herbstein's cause of action: Bruetman's refusal to sign or approve them. The 402 M. statement included a point of law under Rule 44.1 of the Fed. R. Civ. P. when points of foreign law are raised. All matters of foreign law are supported by authoritative affidavits. (99A00811 Dock 101 *3) Each one of the issues covered by the Argentinean courts was placed in sequential order, matching each one of the issues raised by the Amended Adversary Complaint. (402 M Par. 22, 23.); (402M Par. 24); (402M Par. 25); (402 M Par. 26); (402M Par.26); (402M Par. 27); (402 M Par. 28); (402M

Par. 29) (402M Pars. 30-67). The motion papers established the elements for issue preclusion.

Misconstruction of the New York Court Opinion. Significance for International Recognized Doctrines and Effect on International Trade.

The District Court (A19) is wrong when states " The New York Court reached the same result years earlier." (1990) *Herbstein v. Bruetman*, 743 F. Supp 184, 186-190 (S. D. N.Y. 1990). That court ruled on a motion to defer and or stay proceedings until the Argentinean Court issued its opinion. The New York Court supported his opinion with the abstention doctrine. Federal Courts have an obligation to exercise concurrent jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S.800 *818 (1976). It is beyond logic that the obligation to exercise concurrent jurisdiction, sets a race between courts to see which one first reaches the finish line. Issues of Public Order or Interest are an exception.

It is important that the Supreme Court clarifies the issue since the likelihood is that in the future it may be invoked rather frequently. (Fast track bill) The issues not only involve the abstention doctrine, but cases with identical litigants in both, a foreign and the United States jurisdiction, on matters and events that took place within the foreign jurisdiction and the litigants being subject to the jurisdiction of two sovereign States. In this case both parties have accepted the Argentinean Courts jurisdiction as matter of law rather than by Court Orders. Each country's court may rule in conflict with the other, which Court has the ultimate authority, if any? Bruetman has not obligations toward Herbstein within Argentina's jurisdiction, further he might have a cause of action against him for his legal actions in the United States, on the other hand Herbstein had a cause of action against Bruetman, which is supported by the Bankruptcy Court opinion. Isn't Bruetman position jeopardized by facing a double bind situation? Aren't Comity and the Abstention Doctrine supposed to provide equanimity? The concept that all disputes must be resolved under our laws and in our courts is a parochial one and should be rejected. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1,9, (1972).

The District Court limits itself to quote the Bankruptcy Court; this is not observing *de novo* standard. The affidavits as they refer to the Argentinean Courts' opinions do not solely refer to their organization, as the Bankruptcy Court describes. Should a Bankruptcy Judge consider that a foreign Judge's equivalent to a Section III Judge and that the Courts of Appeals of Argentina are acting as the equivalent of a United States Court of Inquiry? (A52) Such conclusion in light of Affidavits of an Argentinean ex Assistant District Attorney and a retired Federal Judge is an error of law and a misguided parochial concept. The Courts not only haven't properly read any of the Affidavits, if they read them at all, but also confused whose affidavits (Carrio, Gorostiza) were introduced by which parties, in which jurisdiction and how many of them were introduced.

Even if the Argentinean proceedings would have been a Court of Inquiry ruling, which is not the case here, Collateral Estoppel applies to a Foreign Default Judgment *In Re B-E Holdings, Inc.*, 228 B.R. 414 (B.R. E.D. Wis. 1999). Administrative agencies' decisions may be given collateral estoppel effect, if agency acted in a judicial capacity. *Meyer v. Rigdon,* 36 F.3d 1375 (7th Cir. 1994), *University of Tennessee v. Elliot*, 478 U.S.788, *799 106 S. Ct. 3220 *3226, 92 L. Ed 2d 635 (1986). There is ample support giving similar preclusive effect to a judgment from foreign court, which observed all the requirements set by the United. States Codes and Procedures.

The Courts below conclusion that no final judgments were rendered have neither legal nor factual support. (A51-52). The opinions attached to Bruetman's motion for Summary Judgment (Argentinean Lower Court and Court of Appeals) supported by affidavits are Final and Nonappealable. Dr. Gorostiza Esq. (Affidavit Par. 15) states that the opinions have Res Judicata effect in Argentina, as defined by Prof. Pardo affidavit. (99A00811 dock. 103, 105; Appellant Brief at A 47 and A 200). The affidavits relating to the Res Judicata in Argentina were introduced under instruction of the Bankruptcy Court (Tr. Hearing 8/27/99).

The Argentina Criminal Court opinion determined that it was unable to find any action, which could be prosecuted as result of the investigation, therefore, the case is "temporarily dismissed"(A53) Temporary dismissal is an Argentinean Penal Code figure which was eliminated in 1992 by a reform of the Code, and the Bankruptcy Court was made aware of the fact (Appellant Brief at 219) The Court erred when it concluded that such dismissal did not have finality (A52) based on a 1990 opinion; it overlooked the Affidavit by Prof Casal. (99A00811). Even the New York realized that the dismissal well may have dispositive effects, but was not final at the time. *Herbstein v. Bruetman*, 799 F. Supp. 1450 (1992).

The Court erred as a matter of law when it concluded that the Argentinean dispositions were not judgments since no determinations were entered in favor or against any party. The denial of a motion in a prior proceeding raised, considered, and litigated the issues presented in the motion, and the court, by denying the motion, rejected the grounds that were advanced in support of the motion. *Gilldorn Savings Association v. Commerce Saving Association*, 804 F. 2d 390 *393-394 (7th Cir. 1986). Such a determination plainly resolves a matter in favor of one party and against another. Both parties were in the motion papers.

Last In Time Principle

The District Court ignored in its opinion, the Last in Time principle. (A19).

Under traditional *res judicata* doctrine, where there are conflicting judgments and each would be entitled to preclusive effect if it stood alone, the last in time controls in subsequent litigation. Restatement of Judgments Sec. 42 (1942), *Dimock v. Revere Copper Co.*,117 U.S. 559(1886) "Judgments In Search Of Full Faith And Credit: The Last-In-

Time Ruling For Conflicts Judgments", Ginsburg 82 Harv.L.Rev. 798, 800, 811-30 (1969) *Treines v. Sunshine Mining Co.* 308 U.S. 66(1939); *Morris v. Jones*, 329 U.S. (1947). In *Morris* the Supreme Court emphasized the necessity for the first in time to challenge the last litigation up to Certiorari, otherwise waives its defense rights. Herbstein was aware of the significance of the Argentinean litigation. He asked for Letters of Rogatory from the New York Court (N. York dock. 121). He tried to estop his own Argentinean litigation by bringing the default New York judgment. The request was dismissed up to the appellate level. Herbstein did not pursue it to certiorari. Plaintiff could have asked for a dismissal, he did not, but appealed the Argentinean Lower Court Judgment although he had already "won" in New York. Further it would have been discovered that the bond that was supposed to have been in place in Argentina was not available.

Rights acquired by judgment or decree may be terminated in the same manner, so if a matter litigated to final judgment is subsequently relitigated and adjudicated, the last judgment controls and determines parties' rights and cannot be collaterally impeached by showing the first judgment. *Ambiatelos v. Foundation Co.,* 203 Mis. 470, 116 N.Y. s 2d 641 (1952). Even if dismissal of ex-wife's California action to recover for ex-husband's breach of separation agreement were res judicata under California Law and entitled to full faith and credit under the New York law, it was superseded by judgment in English Court in favor of ex-wife which was to be enforced pursuant to principles of Comity and New York last-in-time rule. *Ackerman v. Ackerman*, 517 F. Supp. 614 (D.C.N.Y. 1981).

Comity

Hilton v. Guyot, 159 U.S. 113 (1895) sets the conditions that a foreign judgment must meet to be considered for invoking the Doctrine of Comity. Argentina subscribes to the same criteria spelled out by *Hilton*, (Prof. Pardo Affidavit). The case at bar meets all the conditions of the letter and the spirit of *Hilton*. The Bankruptcy Court denies Bruetman's rights to invoke the Doctrine, citing *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 32 S. Ct. 309 (1912). The Bankruptcy Court (A49) makes a case that neither the Constitution nor any statute of the United States requires federal courts to give full faith and credit to the judgments of foreign nations. The argument is defective; it relies on the apparent negative pregnant, under the rule of construction that an express requirement contrasts with statutory silence. Full Faith and Credit Clause has substituted a command from earlier principles of Comity. *Estin v. Estin*, 334 U.S. 541, 546 (1948) The original content was properly derived, not controlled, from international conflicts of law. Full Faith and Credit Clause applies within the Uniform Foreign--Money Judgment recognition. *Sun Oil Co. v. Wortman,* 108 S. Ct. 2117 (1998) In *Société Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa*, 107 S. Ct. 2542 (1987) the Supreme Court in [FN 27] cites *Emory v. Grenouch*, 3 Dall. 369, 370, n, 1 L.Ed. 640 (1797), which refers to Comity as the "spirit" of cooperation, transcribing an extract from Ulrich Huber from 1636: "By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect where, so far they do not occasion a prejudice to the rights of the other governments, or their citizens", "[N]othing would be more convenient in the promiscuous intercourse and practice of mankind, than what was valid by the laws of one place, should be rendered of no effect elsewhere..." *Id.*

Restatement Legal Effect vs. Statutes and Supreme Court Opinions

The New York judgment is final but not conclusive, the Argentinean judgments are final and conclusive, as required by the Uniform Foreign Money-Judgments Recognition Act, IL ST CH 735 5/12 619-620. (Old Ch 110), "[t]he foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." The Bankruptcy Court chose to give greater authoritative effect to the Restatement (Third) of Foreign Relations Law of the United States (1986) Sec. 482 (2) (e) than to an Illinois Statute. The Supreme Court considers the Restatement as a guide, *Id. Société*.

The Bankruptcy Court obfuscates *Ingersoll Milling Machine Co. v. Granger*, 833 F. 2d 680. The Court had chosen out of context whichever section of the case is convenient to support its conclusions and wrongly reasoned that it was an attempt to relitigate the New York case. The Bankruptcy Court cites in support on the matter of Comity *Philips Medical Int'l B.V. v. Bruetman,* 8 F. 3d 600 *604 *605 (7th Cir. 1993), which cites *Ingersoll* as one of the cases in which it has opted for a laxer interpretation of Comity. In truth if there is a case that from the procedural viewpoint as well as in the sequences of rulings and court orders, it could be considered a carbon copy of the case at bar it is *Ingersoll.*

The Philips litigation and Philips, Herbstein v. Bruetman, 241 F.3d 586 (7th Cir 2001)].

The Bankruptcy Court citing *Philips* as a footnote (A21 (FN)) is irrelevant. The Cross Motion Memorandum of Law pages 2 to 5 covers a detail description supported by exhibits of the Philips matter. The footnote was not part of the previous withdrawn opinion. (A20 FN). The Seventh Circuit pursuant to Rule 201(c) of Fed. R. of Evidence took judicial notice of *Philips*, in *Herbstein v. Bruetman*, 241 F.3d 586 (7th Cir 2001). However, Rule 201 (b) of the Fed R. of Evidence would have precluded the Court from citing it without at least noticing that were issues in dispute. See also above page 1 (FN).

Retrospectively, Bruetman's deposition conduct in *Philips* 8 F.3d 600, probably should have been different. But the District Court had removed his counsel and took over a year to the Seventh Circuit to overrule the District Court and to refer Philip's counsels to the Disciplinary Committee. (There is no implicit or explicit legal intention of revisiting closed litigations). In *Philips* *604 *605 Judge Posner covered two matters, which were conducive to the resolution of the litigation. First, Comity issues, stating that the Seventh Circuit takes a laxer interpretation of the doctrine. Second, the effect on the relationship between the two countries. In 8 F. 3d *606 *607. Judge Posner was unaware that Argentina's authority had filed Letters of Rogatory, issued in proceedings against Philips, its local and United States counsels for fraud to the courts and that the Distrit Court did not honor. Despite *Philips* "victory" and the recognition by the Argentinean Court of Appeals of the Seventh Circuit opinion, Philips requested to settle the matter. The agreement was filed and entered by the District Court. The agreement dropping all charges, vacating the judgments and assuming Bruetman's pending legal costs in Argentina vindicated Bruetman after significant emotional and economic hardship. (91 civ 04385 dock. # 304-305; 320-331). Both underlying proceedings, Philips and Herbstein's, are default judgments, but there is a material difference regarding comity. The Argentinean Courts recognized the difference. Meanwhile Philips had a lengthy written opinion regarding the issues as determined by the Seventh Circuit, Herbstein's default judgment failed to meet the minimal standards and the Argentinean Courts refused to recognize it. The Courts below not only failed to recognize such clear difference but also, failed to recognize Comity as applied to this case.

CONCLUSION

For all the above stated reasons, this Petition for Writ of Certiorari should be granted

Respectfully submitted

Martin E. Bruetman, *Pro Se*
77 W. Huron St. # 214
Chicago, Illinois.60610
(312) 944 0782

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted March 25, 2002[*]
Decided April 5, 2002

Before

Hon. Frank H. Eaterbrook, Circuit Judge
Hon. Terence T. Evans, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

Diego J. Herbstein	)	Appeals from the United
Plaintiff-Appellee,	)	States District Court for
	)	The Northern District of
Nos. 01-3583 &01-3587 v	)	Illinois, Eastern Division.
	)	
Martin E. Bruetman	)	Nos.01-2829, 5305
Defendant-Appellant.	)	Charles P. Kocoras, *Judge.*

Order

For more than a decade, Diego Herbstein has been trying to collect a multimillion dollar judgment against Martin Bruetman. *Herbstein v. Bruetman* 241 F.3d 586 (7th. Cir.2001), the most recent episode to reach this court, narrates a small part, the contretemps. We recounted there that Bruetman had asked the bankruptcy court to discharge the debt too Herbstein, and that the bankruptcy judge has declined. *In re Bruetman,* 259 B.R. 649 (Bankr.N.D.Ill. 2001). Since then, the district court has affirmed this decision, 266 B.R. 676 (N.D.Ill. 2001), and has denied Bruetman's request for sanctions against Herbstein for what Bruetman calls a violation of the automatic stay in bankruptcy. In appeal No.01-3583 Bruetman contests the non-discharge decision, and No. 01-3587 concern sanctions.

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[*] These appeals have bee submitted to the panel that heard the most recent related appeal. See Operating Procedure 6(b). After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R. App. P 34 (a); Cir. R. 34 (f)

We directed the parties to address in No. 01-3583 the question whether we have appellate jurisdiction. The responses show that we do. The adversary action concerning dischargeability has been concluded, and the bankruptcy itself is closed. The decision thus its final and appealable. 28 U.S.C Sec. 158(d). On the merits we affirm the reasons given by the district judge. Likewise we affirm in No. 01-3587 for the reasons stated by the district court. Bruetman must stop litigating and start cooperating in the repayment of this debt.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 30 2002

Before

Hon. Frank H. Eaterbrook, Circuit Judge
Hon. Terence T. Evans, CircuitJudge
Hon. Ann Claire Williams, Circuit Judge

Diego J. Herbstein	)	Appeals from the United
Plaintiff-Appellee,	)	States District Court for
	)	The Northern District of
Nos. 01-3583 &01-3587 v	)	Illinois, Eastern Division.
	)	
Martin E. Bruetman	)	Nos.01-2829, 5305
Defendant-Appellant.	)	Charles P. Kocoras, *Judge.*

Order

Defendant-appellant filed a petition for rehearing and rehearing en banc on April 19, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 8, 2002

By the Court

IN RE:	)	Appeals from the United
	)	States District Court for
Martin E. Bruetman, Doctor	)	The Northern District of
Debtor-Appellant.	)	Illinois, Eastern Division.
	)	
Nos. 01-3583 and 01-3587	)	Nos.01-2829, 5305
	)	Charles P. Kocoras,
	)	Judge.

Upon consideration of the MOTION REQUESTING STAY OF MANDATE PURSUANT TO RULE 41 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, filed on MAY 3, 2002, by the pro se appellant,

IT IS ORDERED that the motion is DENIED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIEGO HERBSTEIN)
)
Plaintiff- Appellee,)
)
)
vs.) 01 C 2829
)
)
)
MARTIN BRUETMAN)
)
)
Defendant-Appellant)

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

INTRODUCTION

For nearly eleven years Diego Herbstein and Dr. Martin Bruetman have engaged in multiple litigations against each other. Mist recently Herbstein filed an Amended Adversary Complaint in the Bankruptcy Court for the Northern District of Illinois seeking to deny Dr. Bruetman's discharge in Bankruptcy and to determine the dischargeability of debt owed to him by Dr. Bruetman. The Bankruptcy Court of the Northern District of Illinois granted Herbstein's motion for summary judgment on Counts I and II of the Amended Adversary Complaint, concluding that the debt was nondischargeable. The Bankruptcy Court denied Dr. Bruetman's cross-motion for summary judgment on Counts I and II. Now Dr. Bruetman appeals. For the foregoing reasons, we affirm the Bankruptcy Court.

BACKGROUND

Myriad events spanning more than a decade have led to dispute at hand. Not all of them are relevant to the task before us, so we limit our recitation accordingly. In late 1986 or early 1987, Dr. Martin Bruetman solicited money from Diego Herbstein to invest in a business venture aimed at establishing a sophisticated medical diagnostic center in Buenos Aires, Argentina. Under Dr. Bruetman's proposal, he and Herbstein were to provide equal amounts of capital to fund the venture. In April 1987, Herbstein began making payments to Dr. Bruetman. By July 1987, Herbstein's contributions to the investors' newly formed company, Alta Technologia Medica S.A, ("Altec-1"), totaled approximately $447.000. Herbstein says he intended those funds to comprise his capital contribution to the business in exchange for receiving 50% of the company stock.

By late 1987, problems developed between Herbstein and Bruetman. Herbstein suspected that Bruetman was using Altec-1's time, money, personnel, overhead and resources to develop another business unrelated to the venture. The two agreed to make some changes including the formation of a new business venture and the reconfiguration of titles and stockholdings.

Despite these changes, the problems continue. Herbstein. Herbstein brought some of these problems before the Criminal Courts in Argentina by filing in March of 1989 a request for an investigation concerning allegations of fraud against Bruetman. On October 10, 1990, the Court " temporarily dismissed" the action, ruling that no one was to be prosecuted. Bruetman, too, sought recourse in the criminal court. In March 1989 he filed in the same court a request for an investigation. On October 10, 1990, temporarily dismissed his request finding inadequate evidence to support a finding of fraud. Herbstein also sought civil relief in the Commercial

Division of the Argentine Court system in August 1989. He file a suit requesting removal of Bruetman and others as directors and seeking a determination that those directors had wrongfully carried out their duties at the newly formed company.,

Moreover, Herbstein turned to the American courts for relief. On October 16'1989, before any ruling in the Argentine civil case, Herbstein filed a complaint in the United States District Court for the Southern District of New York ("the New York action"). The five –count complaint asserted claims of racketeering, breach of fiduciary duties, fraudulent misrepresentation, fraudulent concealment, and conversion. The proceeding lasted nearly three years, from October 16, 1989 to August 10, 1992. Counsel represented Bruetman at all times while the case was pending. Through counsel, filed an answer, engaged in discovery, participated in the preparation of the Pretrial Order filed by the parties, and filed and briefed a motion for summary judgment. During discovery, the parties deposed at least twelve witnesses. Herbstein's deposition lasted seven days, generating a transcript exceeding 1200 pages; Bruetman's deposition ran longer, on ten separate days, generating a transcript exceeding 1800 pages. The parties exchanged thousands of pages of documents. Bruetman and other defendants retained an expert witness.

In October 1991 as the parties continued to engage in discovery, the New York court granted Herbstein's application for an order requiring Bruetman to disclose his financial assets and liabilities. That information was relevant to the punitive damages Herbstein planned to pursue at trial. Bruetman did not comply with the court's order. A subsequent order was issued on July 14, 1992, this time specifying that if Bruetman failed to comply by July 23, he would suffer the penalty of a default judgment for the relief demanded in Herbstein's complaint. On July 23, Bruetman's counsel apprised the court via letter that Bruetman and his companies could not comply with the order "because of their inability to assemble and prepare the financial information requested without professional accounting assistance." The letter acknowledge that this non-compliance subjected Bruetman to default judgment and advised that no appeal would be taken from any default order entered as a result of failure to comply with the court's order.

On August 10, 1992, the New York court entered a default judgment against Bruetman. The order declared that Bruetman had willfully failed to comply with the court's order to produce affidavits and documents concerning their current assets and liabilities. Bruetman did not appeal the judgment.

Approximately one year after entry of the default judgment, the Argentina court rendered a ruling in Herbstein's civil case. Although Herbstein's had labeled his case an "individual action of responsibility," the court ruled that damages could be awarded only for facts found to injure the corporation directly, not for facts that harmed the individual stockholders such as Herbstein. Accordingly, the court concluded that the wrongful conduct alleged by Herbstein did not support an individual action. The court reclassified the action and analyzed its viability as shareholder derivative suit on behalf of the corporation. That decision was "revoked" on appeal, however. On December 19, 1995, the reviewing court found the action could not be reclassified as derivative suit on behalf of the corporation.

On March22, 1999 Bruetman filed a petition in bankruptcy in the Northern District of Illinois pursuant to 11 U.S.C. Sec.101 et seq. The Bankruptcy Court entered an order discharging Bruetman's debts on July 8, 1999. Following the discharge Herbstein initiated an Adversary Complaint to recover from Bruetman the debt owed pursuant to the New York judgment. Herbstein filed a motion for summary judgment to determine the dischargeablity of the debt owed pursuant to the New York default judgment. Specifically, the motion asked for summary judgment on Counts I and II of the complaint. Count I was based on Sec. 523 (a)(2)(A), which excepts from discharge any debt by false pretenses, a false relationship or actual fraud, and Count II was based on Sec. 523 (a)(4), which excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. Herbstein argued that the New York default judgment has determined issues of fraudulent misrepresentation and fraud or defalcation while acting in a fiduciary capacity. As a consequence, according to Herbstein, Bruetman was collaterally estopped from contesting the dischargeabilty of the debt under Counts I and II. The Bankruptcy agreed and granted Herbstein motion.

Bruetman also moved for summary judgment on the Adversary complaint. He claimed that the issues asserted in Counts I and II were fully litigated in Argentina and determined adversely to Herbstein. The Bankruptcy rejected those contention and denied the motion.

Dr. Bruetman now appeals the Bankruptcy Court's decision[1]. His brief names six grounds for the appeal, namely that:

> The trial court erred as a matter of law in holding that there is no genuine issue as to any material fact in connection with Herbstein's motion for summary judgment; The trail court erred as matter of law in

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[1] In reaching this decision, the Bankruptcy Court relied on the parties' statement of undisputed facts filed pursuant to Local Bankruptcy Rules 402m and 402N. (Mem. Op. of March 8, at 3.) Specifically, the Bankruptcy noted that Dr. Bruetman filed in response to Herbstein's motion for summary judgment a Rule 402n statement that did not contest the facts and proceedings shown in the Southern District of New York case. When Dr. Bruetman later filed his cross-motion for summary judgment, he filed a Rule 402M statement to which Herbstein was no given opportunity to respond. The Bankruptcy Court was careful to explain that its memorandum Opinion "assumes arguendo the accuracy and authenticity of every document and fact asserted by Dr. Bruetman in connection with his motion (which said documents and facts are not, treated as responsive to Herbstein's motion since they were not offered in response thereto).(Id.)

holding that the issues sought to be precluded in the adversary proceeding were the same as those involved in the New York litigation;

The trial court erred as matter of law in holding that the issues sought to be precluded in the adversary proceeding were actually litigated in the New York litigation;

The trial court as a matter of law in holding that the determination of the issues sought to be precluded in the adversary proceedings was essential to the final default judgment in the New York litigation;

The trial court erred as matter of law in holding that the cross-motion for summary judgment based on principles of comity and the preclusive effect of the Argentina litigation was factually inadequate to support summary judgment as matter of law; and

The trial court erred as matter of law in holding that Dr. Bruetman did not demonstrate errors in fact or law which warranted the altering or amendment of the judgment.

These grounds comprise three general categories of appeal: errors in identifying genuine issues of material fact and applying the procedural standard for motion for summary judgment (Ground 1); error in applying the collateral estoppel doctrine (Grounds 2, 3 and 4); errors in determining the effect if any of the Argentina litigation (Ground 5) ; and errors in applying the standard for motions to reconsider (Ground 6).

LEGAL STANDARD

In reviewing an appeal of a decision of the Bankruptcy Court, we uphold the Court's finding of fact unless clearly erroneous. See In re Marrs-Winn., Co., 103 F.3d 584, 589 (7th. Cir.1996) (citing Fed. R. Bank. P. 8013). We review de novo the court's legal conclusions as well as its ultimate decision to grant summary judgment. See In re Lefkas Gen'l Partners, 112 F. 3d 896, 899-900 (7th. Cir. 1997).

DISCUSSION.

1. Absence of Genuine Issues of Material Fact.

Dr. Bruetman devotes substantial portion of his brief to what he perceives as the Bankruptcy Court's "inaccurate", "misleading" and loose apprehension and presentation of the facts underlying the dispute. He contends mostly "created [a] misleading impression..." We are not in the business of determining what impressions emerge from the Bankruptcy Court's opinion, however. Rather, our task is to determine whether alleged inaccuracies and mischaracterizations constitute erroneous findings of fact. What Dr. Bruetman deems mischaracterizations we find to be the fair inferences that the Bankruptcy Court was entitled to draw, and no reasonable juror could construe those inferences in favor of Dr. Bruetman. Furthermore, and critically, the Bankruptcy did not rely on those challenged findings in rendering its judgment.

Ironically, while Dr. Bruetman criticizes the Bankruptcy Court for its overbroad and loose characterizations of the facts, Dr. Bruetman makes similar loose assertions as to what constitutes factual rather than legal conclusions. At several points in his brief he evinces a tendency to interpret language too narrowly. For instance, he urges as to reject the Bankruptcy Court's finding of fact that he "would not" comply with the New York court's order, arguing that he "could not" comply with it. Whether he would not or could not comply is not the issue, however. The stark fact is that he did not comply, and on this the Bankruptcy Court based its decision.

In addition, Dr. Bruetman believes that the Bankruptcy Court erroneously discounted nearly all of his asserts facts pertaining to the New York default judgment because they go behind the record of the proceedings. Dr. Bruetman notes that despite this admonition, the Court went behind the record to find facts leading to its conclusion that the default judgment was actually litigated and therefore rendered immune from collateral attack. In particular, Dr. Bruetman challenges the Bankruptcy Court's determination that Dr. Bruetman was at "at fault in preventing" the resolution of the litigation, that he " frustrated efforts to bring the action to trial", that the New York court treated Dr. Bruetman's conduct "as major interference with Plaintiff's effort to prepare for trial", and that the court concluded that Dr. Bruetman "willfully disobeyed repeated court orders and suffered entry of a default judgment" (Amd. Mem. Op. of 3/8/01 at 21, 22, 23, 21.) Each of these conclusions is unassailable. Entry of the default judgment prevented the resolution of the litigation. The default judgment was entered because Dr. Bruetman failed to comply with the court's repeated orders to disclose financial information. The fair inference, and indeed the only reasonable one, was that the fault rested with Dr. Bruetman, not Herbstein. Furthermore, because Dr. Bruetman's conduct brought about the entry of a default judgment, Dr. Bruetman frustrated efforts to bring the case to trial. The court treated the noncompliance as a major interference with Plaintiff's effort to prepare for trial because the noncompliance was precisely that-a major interference that effectively disabled Plaintiff from gathering facts on which to base its case. As for the Bankruptcy Court's willfulness finding, it lifted that language from the text of the default judgment. In sum, the Bankruptcy Court drew the only reasonable inferences from the record before it. We find noting erroneous in those inferences.

Dr. Bruetman also challenges the computation of the judgment award in the default judgment as not being based on competent evidence (Id. at 25 para. K.) This argument must fail, as the Bakruptcy Court expressly relied upon the calculation of the damages in the parties' joint pretrial statement filed in the New York court, the New York judgment order itself, and affidavit from the attorney who drafted the judgment order. The evidence supporting the computation is sound and we shall not disturb the computation.

2. Collateral Estoppel

Dr. Bruetman contends that the bankruptcy Court erred in determining that Dr. Bruetman was collaterally estopped from contesting the dischargeabilty of his debt to Herbstein under Counts I and II of the Amended Adversary Complaint. We affirm the Bankruptcy Court's determination.

Collateral Estoppel prohibits the relitigation of issues that have been adjudicated in a prior lawsuit. The principles apply in discharge proceedings in bankruptcy court. See Grogan v. Garner,.498 U.S. 279, 284-285 n.11 (1991). Because a federal court rendered the prior judgment in the case at bar, federal principle of collateral estoppel apply. Heiser v. Woodruff, 327 U.S. 726, 732 (1945). Those federal principles dictate that for a party to be estopped from relitigating an issue, the following elements must be present: (1) the issue sought to be precluded must be the same as one involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action. See Havoco of America, Ltd. V. Freeman Atkins & Coleman, Ltd., 58 F. 3d 303, 307 (7th. Cir.1995); Adair v. Sherman, 230 F. 3d 890, 893 (7th. Cir. 2000).

At least three circuits have addressed the intersection of default judgments and the collateral estoppel doctrine in bankruptcy actions. In cases strikingly similar to the ones at bar, the Third, Ninth, and Eleventh Circuits have all concluded that where a default judgment was entered against a debtor as a discovery violation, the debtor is collaterally estopped from claiming that the debt underlying the judgment is dischargeable in bankruptcy. See In re Docteroff, 133 F.3d 210 (3d Cir. 1997); In re Bush, 62 F.3d 1319 (11th Cir. 1995); In re Daily, 47 F.3d 365 (9th Cir. 1995). In the first of these cases, Daily, Debtor Dailey filed a petition for relief in the United States Bankruptcy Court for the District of Hawaii. See. 47 F. 3d at 366. The FDIC filed an adversary complaint to determine the dischargeability of a debt allegedly owed to them. See id. Another FDIC action, this alleging civil RICO violations, was pending in the United States District Court for the District of Kansas in which Daily was eventually named as defendant. See id. at 366-67. The District Court entered a default judgment in favor of the FDIC, ordered all allegations of the complaint deemed admitted by Daily, and trebled the damages alleged. See id. When the FDIC moved for summary judgment on its dischargeabilty complaint, the bankruptcy court held the debt nondischargeable, concluding that the Kansas court's order and judgment in the RICO action established the allegations of fraud in the RICO complaint and that the facts thus established the allegations of fraud in the RICO complaint and that the facts thus established were sufficient to preclude the Discharge of Daily's debt to the FDIC under 11 U.S.C Sec. 523 (a) (2)(A) as debt for money obtained by fraud. See id.

The Ninth Circuit agreed. The judgment entered in the RICO action was "not an ordinary default judgment." Id. at 368. Daily had not merely decided that "the burden of litigation outweighed the advantages of opposing the FDIC's claim" and failed to appear. Id. Instead, he "actively participated" in the litigation for two years before judgment was entered against him. Id. The Ninth Circuit concluded that

> [a] party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by prior judicial determination reached without complaetion of the usual process of adjudication. In such a case the "actual litigation" requirements may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so. Id.

To hold otherwise, the Court reasoned, would permit debtors to delay substantially and perhaps ultimately avoid debts by deliberate abuse of the judicial process. See id.

The Eleventh Circuit embraced this rationale in In re Bush 62 F.3d 1319 (11th Cir. 1995.) Bush had been sued by Balfour Beatty Bahamas ("BBB") alleging a claim of fraud. See Id. at 1321. Although Bush initially participated in discovery, he gradually dropped out of the case. See id. Bush subsequently failed to produce trial exhibits or appear for properly noticed deposition. See id. When Bush failed to appear at the pretrial conference, the Court found that sanctions were warranted and entered an order for default judgment on the grounds stated in BBB's complaint. See id. at 1321-22. Bush filed no objection to the default nor to the final judgment served on him. See id. at 1322.

Later that year, in November 1991, Bush filed a voluntary petition for bankruptcy pursuant to Chapter 7. See id. at 1322. BBB filed an adversary complaint to determine dischargeability of its judgment against Bush. See id. In opposition to BBB's motion for summary judgment, Bush argued that the prior judgment should no preclusive effect because the fraud issue had not been actually litigated. See id. Both the bankruptcy court and district court rejected this argument, and the Eleventh Circuit affirmed, holding that in a bankruptcy discharge exception proceeding, a default judgment based upon allegations of fraud may be used to establish conclusively the elements of fraud and prevent discharge of the judgment debt. See id at 1322, 1324. As the Court opined, "[i]t would be undeserved to give debtor/defendants a second bite at the apple when knowingly choose not to defend himself in the first instance." Id. at 1325 (quoting In re Wilson, 72 B.R. 9566, 959 (Bankr. M.D. Fla. 1987). Once again, then, an atypical default judgment received preclusive effect in a subsequent proceeding to determine dischargeability of the debt.

A third court echoed these results in In re Docteroff, 133 F.3d 210 (3d Cir. 1997). The Third Circuit held that a default judgment entered against a defendant in a fraud action as a sanction for the defendant's repeated and bad-faith refusals to comply with discovery requests collaterally estopped the defendant from claiming that the debt underlying the judgment was dischargeable in bankruptcy. See id at 212-13. A corporation and an individual sued Docteroff alleging fraud. See id. at 213. Although Docteroff answered the complaint and noticed one of the plaintiff's depositions, he repeatedly refused to submit to properly noticed depositions or respond to numerous legitimate requests for production of documents despite court arder and warnings. See id. The court found Docterroff's non compliance to be willful and in bad faith and, as sanction, entered a default judgments against him on the issue of liability. See id. at 213-14. The court ordered a trail on damages. See Id. at 214. On the day the trial was to begin, Docteroff filed a Chapter 11 bankruptcy petition. See id. When plaintiff then filed an adversary action against Docteroff, the bankruptcy court found that the default judgment had collateral effect. See id.

The Third Circuit observed that the situation before it was "not a typical default judgment where a defendant neglects or elects not to participate in any manner" due to inconvenience, expense or some other reason. Id. at 215. To the contrary, Docteroff had "participated extensively" in litigation by filing an answer, noticing his opponent's deposition, engage several lawyers, filing papers with the court, and corresponding with opposing counsel. See id.

Ultimately, Docteroff "simply elected not to comply with court orders" Id. In light of this choice, the Third Circuit "d[id] not hesitate" to conclude that collateral estoppel precluded an attack on the issues underlying the default judgment. Id. To hold otherwise would "give litigants who abuse the process and dignity of the court an undeserved second bite at the apple." Id.

The case before us falls squarely inline with Daily, Bush and Docteroff. Over the course of nearly three years—far longer even than the defendants in the three aforementioned cases—Dr. Bruetman participated extensively in the New York litigation. Throughout he was represented by counsel. Through counsel, Dr. Bruetman filed an answer, engaged in discovery, participated in the preparation of pretrial order, and filed a motion for summary judgment. The parties deposed at least 12 witnesses and exchanged thousands of pages of documents. Dr. Bruetman retained an expert witness. The pretrial order listed 252 exhibits for Herbstein and more than 700 for Dr. Bruetman.

Notwhistanding this extensive participation, Dr. Bruetman failed to comply with the court's order to disclose his assets and financial conditions. That information was relevant to Herbstein's punitive damages claim. The first such order was issued in October 1991. By July 1992 Dr. Bruetman had not complied, prompting the New York court to enter on July 14 an order instructing Dr. Bruetman to disclose the financial information by July 23 or suffer the penalty of a default judgment for the relief demanded in Herbstein's complaint. Dr. Bruetman did not disclose the information. A default judgment issued in the amount of $2,7373,924.40.

In this atypical setting for default judgment, where Dr. Bruetman participated extensively then failed to comply with an express court order issued multiple times at a risk of incurring default, we agree with the Bankruptcy Court and the Third, Ninth and Eleventh Circuits that Dr. Bruetman should not now be able to sidestep the collateral estoppel doctrine and litigate an issue in this forum that was forestalled in New York due solely to Dr. Bruetman's decisions. Dr. Bruetman is not entitled to a second bite at the apple. The issues underlying the New York default judgment were "actually litigated" for purposes of the collateral estoppel doctrine. To hold otherwise would "give [Bruetman] who abuse [d] the processes and dignity of the court an undeserved second bite at the apple. Docteroff, 133 F. 3d at 215.

Dr. Bruetman also challenges application of the collateral estoppel doctrine on two additional grounds, claiming that the issues of the proceedings were not the same and that determination of the issue was not essential to the final judgment. In support of this first contention, Dr. Bruetman identifies a "lacuna" in the Court's analysis: the

Court comparison of the allegations of Herbstein RICO complaint the elements of the two claims brought in Herbstein's adversary proceeding. Dr. Bruetman believes that the Bankruptcy Court erred in relying on the elements of the adversary claims rather than the allegations in the adversary complaint. Dr. Bruetman offers no legal support for this proposition, and indeed there is none. It was sufficient for the Bankruptcy Court to determine whether the allegations of the RICO complaint could state a claim under two dischargeabilty provisions invoked in the adversary complaint. See id. at 215 (stating that the test of sameness is whether all of the elements of the relevant dischargeabilty provisions are encompassed by the allegations made in the complaint underlying the default judgment). After careful analysis, the Bankruptcy Court answered this question affirmatively, and we affirm.

Finally, with respect to essentiality element of the collateral estoppel doctrine, the Bankruptcy Court found that entry of the treble damages award in the New York default judgment established Dr. Bruetman's liability under RICO claim in the New York action. Because the RICO count was the only count that requested treble damages, logic dictates that the element of the claim were essential to the judgment. The inference, drawn by the Bankruptcy Court from the record before it, is unassailable. Dr. Bruetman wrongly characterizes this determination as a "fallacy." It is hardly that. Rather, it is the product of the Bankruptcy Court's thorough review of the record which we shall not disturb upon review.

Accordingly, the Bankruptcy Court properly concluded that all the elements were present to justify application of the collateral estoppel doctrine, thereby precluding Dr. Bruetman from relitigating those issues in the Bankruptcy Court.

3. Effect of the Argentina Proceedings.

Dr. Bruetman believes that he is entitled to judgment as a matter of law on his cross-motion for summary judgment. The cross-motion that the issues asserted in Counts I and II of

Herbstein's Amended Adversary Complaint were fully litigated in Argentina adversely to Herbstein, thus precluding Herbstein from raising them in the instant proceedings. The Bankruptcy Court denied the motion. We affirm.

The Bankruptcy Court concluded that none of the Argentine proceedings culminated in final judgments. Despite the submission of numerous affidavits from experts in the Argentine legal system, Bruetman failed to establish a genuine issue of material fact as to the finality of any so-called judgments issued from the Argentine courts, The New York court reached the sane result years earlier. Although Bruetman criticizes the Bankruptcy Court for borrowing from the New York conclusion, the New York ruling is relevant because, as we have ruled *supra*, the issues in the New York complaint and the adversary Complaint are the same. Accordingly, we affirm the Bankruptcy Court's determination that the Argentine proceedings did not preclude Herbstein from raising the issues asserted in Counts I and II of the Amended Adversary Complaint.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Bankruptcy Court.

"s/ Charles P. Kocoras"
United States District Judge

Dated: September 6, 2001.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:)
)
Martin Bruetman,) Case N0: 99 B 09107
Debtor)
)
Diego Herbstein,)
Plaintiff,) Case No: 99 A 00811
v.)
)
Martin Bruetman,)
Defendant,)
)

AMENDED MEMORANDUM OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I AND II[1]

This adversary proceeding relates to the Chapter 7 bankruptcy petition filed by Marin Bruetman ("Bruetman" or "Debtort") on March 22,1999 under 11 U.S.C. Sec. 101 et seq. Diego Herbstein ("Herbstein" or "Plaintiff") filed a five count Amended Adversary Complaint ("Adversary Complaint") seeking to deny Bruetman's discharge and to determine the dischargeability of a debt owed to him by Bruetman. The debt is evidenced by a judgment entered in the

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[1] This Amended Opinion replaces an earlier Opinion that has been withdrawn.

U.S. District Court for the Southern District of New York on August 10, 1992.[2]

Herbstein moved for summary judgment on Counts I and II of this Adversary in which the debt thereby arising is alleged to be non dischargeable under 11 U.S.C. Secs 523(a)(2)(A) and 523 (a)(4) respectively. The basis for Plaintiff's motion is his argument due to entry of that District Court judgment the doctrine of collateral estoppel applies and precludes Debtor from contesting nondischargeabilty of the judgment of the judgment debt alleged in those two counts. Bruetman objects to application of collateral estoppel because the New York case never went to trial, and argues that the judgment by way of default as sanction for his failure to give ordered discovery. He also contends the Herbstein is judicially estopped to asset collateral estoppel.

Bruetman filed his own cross motion for summary judgment on Counts I and II. He contends that issues asserted in those counts were fully litigated in Argentina courts and were determined adversely to Herbstein, Bruetman contends that the decisions there are entitled to recognition under principles of commity and the doctrines of res judicata and collateral estoppel preclude Herbstein from arguing that the judgment debt is nondischargeable.

Dr. Bruetman appeared here pro se, though his filings demonstrated some sophisticated knowledge of law suggestive of behind-the-scenes legal counseling. However, he has lost on the merits.

For reasons stated below, the New York District Court default judgment is given collateral estoppel effect and

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[2] Debtor's long history of litigation with Herbstein and others is set forth in several opinions out of the District Court in Boston and in our Circuit Court: Philip's Medical v. Bruetman, 982 F. 2d 211 (7th. Cir. 1992), Philip's Medical v. Bruetman, 8 F. 3d 600 (7th. Cir. 1993), Herbstein v. Bruetman, 1993 U.S. Dist. Lexis 2573 (D. Mass 2/1/93), and Herbstein v. Bruetman No. 00-2523 (7th. Cir.2001)

Plaintiff motion for summary judgment on Counts I and II herein will be allowed, while defendant's cross motion for summary judgment on Counts I and II will be denied.

UNDISPUTED FACTS

The parties filed their statement supporting and opening summary judgment under Local Bankruptcy Rule 402Mand 402N as required for consideration of Herbstein's motion for summary judgment, and brief. That briefing was completed and Dr. Bruetman was told from the bench that noting further would be considered on Plaintiff's motion. While he did file a Rule 402N statement and affidavit opposing Plaintiff's motion, he did not contest the facts and proceedings shown in the New York case on which the judgment for Plaintiff rests.

Bruetman filed a Rule 402M statement with his cross motion for summary judgment (originally considered despite a contrary reference in the earlier opinion). However, a scheduled was not set giving Plaintiff an opportunity to file a Rule 402N response to Bruetman's asserted facts and response to the cross motion for summary judgment. The Opinion assumes arguendo the accuracy and authenticity of every document and fact asserted but Bruetman in connection with his motion (which said documents and facts are not, however, treated as responsive to Herbstein's motion since they were not offered in response thereto) Since his cross motion thereby considered factually inadequate to support summary judgment as matter of law, briefing by Plaintiff opposing that motion is unnecessary.

History of Litigation

The following undisputed facts appear from filings:

In late 1986 or early 1987, Bruetman solicited Herbstein to invest money in a business venture to set up a sophisticated medical diagnostic center to be established in Buenos Aires, Argentina. According to Bruetman's proposal, the diagnostic center would provide its services to the Guemes Hospital in Buenos Aires.

Under Bruetman's proposal, he and Herbstein were to provide equal amounts of capital to fund the venture. In April 1987, Herbstein began sending payments to Bruetman through the mail or through wire transfers. Herbstein also made payments directly to a bank account in Argentina set up to begin establishing the proposed company. By June 1987 Alta Tecnologia Medica S.A. ("Altec-1") was incorporated in Argentina. Bruetman became the President and Chief Executuve Officer, Herbstein became Vice President. Both men were to be equal owners of the company stock.

By July 1987, Herbstein's payments to Altec 1 had totaled about $447,000.

According to Herbstein, those funds were intended as his capital contribution to the business, in exchange for which Bruetman was to be given 50% of Al;tec-1 issued stock.

By August 1987, Altect-1 had entered into an agreement with the Guemes Foundation to import, install, and operate medical equipment purchased from Philips Export B.V. (Philips"). In exchange for Altec-1's services, it was to receive a portion of the revenue generated from use of the equipment.

However, by late 1987, Herbstein alleges that he discovered that Bruetman was using Altec-1's time, money, personnel, overhead and resources to develop another business unrelated to the Guemes Hospital services. Those other transactions purportedly benefited Bruetman and High Tech, another corporation in which Bruetman was controlling shareholder and Board Chairman.

Herbstein and Bruetman then agreed to some changes. Altec-1 was renamed Imagenes por Computacion ("IXC"), and Bruetman formed a new business venture which also was named Alta Tecnolgia Medica S.A. ("Altec –2"). Altec-2 was to have nothing to do with the Guemes diagnostic center but would instead pursue and benefit the interests of Bruetman and High-Tech. In mid 1998 Bruetman transferred all his shares in IXC to Altec-2. High Tech then owned 49% of Altec –2 stock; Bruetman's son Carlos held 43% thereof, and Herbstein held 8%.

IXC assumed responsibility for contractual obligations previously held by Altec-1 for providing and servicing sophisticated medical imaging equipment for the diagnostic center of the Guemes Hospital. Plaintiff and Bruetman transferred their capital contributions and financial interests in what had been Altec-1 to IXC and thereby became the sole and co-equal shareholders of IXC. Bruetman became the President, Chief Executive Officer and Chairman of the Board; Plaintiff became the Vice-President.

Disputes later arose between Herbstein and Bruetman. In March 1989, Bruetman filed a request with the Criminal Courts in Argentina for an investigation concerning his allegations of fraud. Herbstein was joined in that proceeding as respondent. On October10, 1990 a decision was rendered in that criminal proceeding, but the decision(discuss further below) merely ruled that no one was to be prosecuted and the action was to be "temporarily dismissed". A dismissal that turned out to be permanent.

In August 1989, Herbstein filed a civil Complaint in the Commercial Division of the Argentine court system. That suit requested the removal of Directors Bruetman, the President of IXC, and other director. It also sought determination that the Directors sought to be removed had wrongfully carried out their duties as Directors of IXC. To support that request, Herbstein alleged certain facts that he claimed to constitute wrongful discharge of corporate duties that damage the corporation business. Herbstein sought therein compensation for damages that he allegedly suffered in consequence of the various defendants' actions in managing the corporation.

On October 16, 1989, before any ruling in the Argentine civil case, Herbstein filed a Complaint in the United States

District Court for the Southern District of New York. The Complaint contained several complicated and detailed claims against different combinations of defendants including Bruetman. It alleged that Bruetman misrepresented to Herbstein in the business deal between them that all money transferred by Herbstein would be used to fund Altec-1 operations. Those funds, some paid directly to Bruetman and others to a bank account set up for the business venture, were allegedly diverted to benefit Bruetman and High Tech. Moreover, Herbstein alleged that when IXC was formed, Bruetman promised that he would be credited with all his capital contributions to Altec-1, but contended that he was never fully credited for all his capital contributions. He also alleged in that suit that several defendants, including Bruetman, sent a letter to him in New York which misrepresented both IXC's financial status and Herbstein's obligations to Altec-2 and High Tech. These and other allegations were contained in a five count Complaint (the "New York Complaint" or the "New York Case").

On Jannuary 17, 1990, Bruetman and other defendants moved to dismiss Herbstein's New York District Court case on the grounds of comity because of the then pending Argentine civil proceedings, or alternatively for forum of non conveniens. Alternatively, those defendants moved to stay the New York Case until the civil proceedings in Argentina were resolved. On July 11, 1990 the District Court denied these motions. Afterwards, on August 10, 1992, a judgment was entered against in the District Court suit under circumstances more fully described below.

One year later on August 5, 1993, in Argentina, the lower court issued a ruling in the civil case. Although Herbstein's suit there was labeled by him as an "individual action for responsibility", the court rankled by reason of facts alleged that any damages claimed could only be awarded for any acts found directly detrimental to the corporation and not for actions that harmed an individual stockholder. Accordingly, the lower Argentine Court determined that wrongful conduct alleged by Herbstein did not support an individual action on his own behalf. The ruling then reclassified the action initiated by Herbstein and analyzed the viability of the action as shareholder derivative suit on behalf of the corporation, concluding that only viewed as such did case state a cause of action.

The lower Argentine court decided to remove Bruetman and another defendant from their positions as Directors and recommended appointement of a new Board of Directors which was to be determine new financial statements for the period ending on August 31, 1998.

That decision in the Argentine lower court was appealed. The reviewing court reversed the lower court, ruling that the action could not be reclassified as a derivative suit on behalf of the corporation.

The net result (as shown by Argentine court documents tendered herein by Bruetman) was that not final judgment was shown by filing here to have been entered in Argentina for or against any party in either the civil action or criminal proceeding.

Bruetman filed for Bankruptcy on March 22, 1999, leading to the instant Adversary case. More detailed undisputed facts follow below.

Herbstein Motion for Summary Judgment.

1. In Herbstein v. Bruetman, et al. 89-CV-6864, Herbstein sued Bruetman and others in the United Sates District Court for the Southern District of New York ("COmplaint"). On October 16, 1989. The Complaint was pleaded in five counts, Racketeering (Count I), Breach of Fiduciary Duty (Count II), Fraudulent Representations (Count III, Fraudulent Concealment (Count IV), and Conversion (Count IV).

2. The proceeding against Bruetman remained pending for about three years, from October 16, 1989, until entry of judgment against Bruetman on August 10, 1992. (On October

30, 1990 the case was closed briefly until reopened on November 1, 1990.)

3. Bruetman was represented by counsel throughout the New York proceeding. His counsel filed an answer, engaged in discovery, and participated in preparation of a Pretrial Order filed by the parties.

4. During discovery proceedings, the parties deposed at least 12 witnesses and exchanged thousands of pages of documents.

5. The deposition of Herbstein took place on seven separate days and generated a transcript in excess of 1200 pages.

6. The deposition of Bruetman took place on ten separate days and generated a transcript in excess of 1800 pages.

7. Bruetman and other defendants retained an expert witness who was a consultant to the accounting firm of Coopers and Lybrand to give testimony at trial regarding certain issues relating to all pertinent defendants.

8. The attorneys for both Herbstein and Bruetman participated in preparing a Final Pre-Trial Order, and Bruetman's attorneys submitted certain sections to Herbstein's attorneys for inclusion therein.

9. On December 18, 1991, the parties submitted the original of their Final Pre-Trial Order(signed by attorneys for all parties) to the District Court Judge presiding at the final pretrial conference, although the Judge did not file that document with the District Court Clerk until after of the judgment in that case.

10. The proposed Pretrial Order listed 252 exhibits for Plaintiff and more than 700 exhibits for the Defendant.

11. The proposed Pretrial Order was submitted to the court jointly for all the parties on December 18, 1991. The Court set a trial date of August 10, 1992.

12. On or about February 21, 1992, Bruetman and other defendants filed a motion for summary judgment which the District Judge denied by order entered on June 19, 1992, for reasons discussed below.

13. In June of 1992, some discovery issues remained outstanding. Those arose from an order entered in October 1991 wherein the District Judge had granted Plaintiff's application for an order requiring Bruetman to disclose his assets and financial conditions, those being relevant to punitive damages to be sought by Herbstein in the forthcoming trial. Bruetman did not comply with that order and a second order was entered to the same effect on or about March 12, 1992. Bruetman failed to comply with that order as well. On July 14, 1992, the Court entered a third order on Bruetman to disclose his financial information by July 23, 1992, this time specifying that he would suffer the penalty of a default judgment to be entered "for the relief demanded" in Plaintiff's Complaint and paragraph 6(b) of the Final Pretrial Order dated 18, 1991 "....if there was not compliance by him."

14. In the face of that warning, Bruetman's lawyer advised the District Judge by letter on July 23, 1992 that he would not comply with the order to disclose assets because of circumstances and other litigation. He acknowledged in his letter that Bruetman was subject to entry of a default judgment because of such disobedience, and further advised that no appeal would be taken from any default order to be entered as a result of failure to comply with the asset disclosure orders.

15. On August 10, 1992, the District Judge entered a default judgment against Bruetman, finding that Defendant Bruetman had willfully failed to comply with Court orders, and expressly determined that there no just reason to delay enforcement of the judgment. The judgment was not appealed.

16. Part 6 of the Final Pretrial Order referred to in the earlier order of July 14th. Provided as follows:

> 6. The following are all of the claims for damages, counterclaims or cross claims or for other relief asserted by the plaintiff in this action, as of the date of this conference.
>
> (a) Plaintiff asserts the following claims for damages:
>
> (1) Civil RICO
>
> (2) Breach of Fiduciary duty
>
> (3) Fraudulent representations
>
> (4) Fraudulent concealment
>
> (5) Conversion
>
> (b) On the claims stated above, plaintiff seeks damages as follows:
>
> (1) the sum of $420,100, representing the amount of plaintiff's capital contributions to and investement in IXC by reason of defendants' fraudulent conduct;
>
> (2) a sum in excess of $235,000, representing the amount that plaintiff has spent in order to protect his investment in and ownership of IXC by reasons of defendants' fraudulent conduct;
>
> (3) the sum of $420,1000, representing the minimum value of plaintiff's financial and ownership interest in IXC;
>
> (4) treble the amount of damages stated above, plus the cost of this suit, including attorneys' fees;
>
> (5) punitive damages; and
>
> (6) interest on the above.

Herbstein was awarded judgment in the amount of $2,737,924.40 against Bruetman. That judgment was calculated based on Plaintiff's claims asserted in the Pretrial Order as follows: actual damages totaling $655,100[Pretrial Order, part 6(b) paragraphs one and two] trebled under RICO statute to $1,965,300, plus attorney's fees and expenses totaling $610,487.15 plus interest amounting to $162,137.25, for the judgment total of $2,737,924.40 after punitive damages prayed for were waived.[DePetris Supplemental Affidavit.]

Bruetman's Cross Motion for Summary Judgment

1. In March 1989, Bruetman filed a request for an investigation with the Criminal Courts in Argentina. Herbstein was joined in that proceeding as an adversary respondent pursuant to Bruetman's request. On October 10, 1990 a decision was rendered in that criminal proceeding placing into limbo by "temporarily" dismissing it, finding inadequate evidence to warrant any finding of fraud. No judgment was rendered for any party an no one was ordered to be prosecuted. Since the investigation was never reopened, it appears to have become finally closed at some point. Bruetman now argues in effect that a finding of no basis to charge criminal fraud against him or Herbstein under Argentine law amounted to a judgment exonerating him from civil fraud under U.S. law, but no such judgment was entered.

2. In August 1989, Herbstein filed a civil Complaint in the Commercial Division of the Argentine court system. On August 5, 1993, (almost a year after entry of the New York District Court judgment), the Argentine lower court issued a ruling in that case, finding that Herbstein could bring a stockholder derivative action on behalf of the corporation, but could not claim personal damages for injury to the company. That decision was appealed and on December 19, 1995, the Argentine Appellate Court issued an opinion reversing the lower court. No judgment was shown here to have been entered for against Bruetman. He was not exonerated from any wrongdoing against the company, let alone Herbstein.

Miscellaneous

Additional facts set forth in the discussion below are also found to be undisputed.

JURISDICTION

Jurisdiction lies under 28 U.S.C. Sec 1334 and 28 U.S.C, Sec. 157. This matter has been referred here by Internal Operating Procedure 15 (a)of the United States District Court for the Northern District of Illinois. Venue is proper under 28 U.S.C. 1409. This matter constitutes a core proceeding under 28 U.S.C. 157 (b)(2)(1).

STANDARDS FOR SUMMARY JUDGMENT.

Rule 56 (c) of the Federal Rules of Civil Procedure, made applicable to Adversary proceedings by Rule 7056 Fed. R. Bank. P., provide that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admission on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law," See also Russo v. Health Welfare & Pension Fund, Local 705, 984 F. 2d 762 (7th. Cir.1993).

Initially the moving party bears the burden of demonstrating absence of genuine issue of material fact. Celotex Corp. v. Catrett, U.S. 317, 323, 106 S. Ct.2548, 2552 (1986). Once the moving party has met that burden, the non-moving party must go beyond the pleadings and bring for the specific facts to establish that there is a genuine issue for trial. Becker v. Tenenbaum-Hill Assoc., Inc., 914 F. 2d 107, 110 (7th. Cir.1990). See also Matsushita Elec. Indus. Co. Ltd v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1536 (1986). The nonmoving party is required to do more than show mere existence of some metaphysical doubt as to the material facts or some alleged factual dispute between the parties in order to defeat the motion, unless the disputed fact is determinative of the outcome under applicable law, Id. At 586, 106 S. Ct. at 1356; Anderson v. Liberty Lobby, Inc. 477

U.S. 242 , 247-8, 106 S. Ct. 2505, 2509-10 (1986). The nonmoving party may not rest on its pleadings or on conclusory allegations in affidavits. Waldridge v. American Hoechst Corp., 24 F. 3d 918, 920-1 (7th. Cir. 1994); Cusson-Cobb v. O'Lessker, 953 F. 2d 1079, 1081 (7th. Cir.1992).

In determining whether a genuine issue of material fact exists the Court must "construe all facts in the light most favorable to the non moving party and draw all reasonable and justifiable inferences in that party favor" Popovitz v. Circuit City Stores, Inc., 185 F.3d 726 731 (7th. Cir.1999); See also Anderson , 477 U.S. at 255, 106 S. Ct. at 2513. However, not every conceivable inference must be drawn in favor the nonmoving party, only those inferences that are reasonable and present a sufficient disagreement between the parties. Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 251 (7th. Cir. 1995); see also Anderson , 477 U.S. at 251-2, 106 S. Ct. at 2512.

PLAINTIFF MOTION FOR SUMMARY JUDGMENT

Counts I and II of Herbstein's Adversary Complaint are based on Sec. 523(a)(2)(A) and Sec.523 (a)(4).

Section 523 (a)(2)(A) excepts from discharge any debt:

> For money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by-
>
> False pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

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Section 523 (a)(4) excepts from discharge any debt:

> For fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny...

Herbstein argues that the issues of fraudulent misrepresentation and fraud or defalcation while acting in a fiduciary capacity, or in the alternative embezzlement or larceny, were determined by the District Court default judgment. Accordingly, Herbstein argues, Bruetman is collaterally estopped from contesting those issues here and therefore cannot contest the dischargeability of the debt under Counts I and II.

A party asserting issue preclusion by reason of collateral estoppel has the burden of establishing its applicability. Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 20 F. 3d 289, 294 (7th. Cir. 1994). Collateral estoppel refers to a judgment's effect of foreclosing litigation in a subsequent action involving those issues actually and necessarily decided in a prior suit. Klingman v. Levinson, 831 F.2d 1292, 12954(7th Cir. 1987); Havoco of America, Ltd. V. Freeman Atkins & Coleman, Ltd., 58 F. 3d 303, 307 (7th. Cir.1995); Adair v. Sherman, 230 F. 3d 890 (7th. Cir. 2000). It is a doctrine which protects the litigants from the burden of re-litigating identical issues with the same party or privy, and promotes judicial economy by preventing unnecessary litigation. Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th.Cir. 1994). The Supreme Court has held that collateral estoppel principles apply in proceedings seeking to bar bankruptcy discharge under 11 U.S.C. Sec. 523(a). Grogan v. Garner,.498 U.S. 279, 111 S. Ct. 654 (1991).

Federal courts must give full faith and credit to the collateral estoppel effects of state court judgment under state standards. Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 105 S. Ct. 1327 (1985). However, in determining the preclusive effect of a prior federal judgment, as in this case, federal standards apply. Havoco, 58 F 3d at 307. As set forth in Havoco and other precedents, four requirements must be met for collateral estoppel to apply to a federal judgment: (1) the issue sought to be precluded must be the same as involved in the prior action, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action. See also Klingman v. Levinson, 831 F.2d at 1295 and Adair, 230 F. 3d at 893.

The fourth requirement was obviously met; Bruetman was fully and aggressively represented by his counsel in the New York litigation. The remaining elements require some discussion, but as shown below each of the additional elements was also shown.

A. Same Facts and Issues

Whether issues are identical for purpose of collateral estoppel is a question of law. E.B. Harper & Co. Inc. v. Nortek, Inc., 104 F 3d 913, 922 (7th. Cir. 1997)

Bruetman argues that the issues sought to be precluded here are not the same as those involved in the New York action, but he is wrong.

Count I of the Adversary Complaint here seeking to deny discharge of the judgment debt owed Herbstein under 11 U.S.C. Sec. 523 (a)(2)(A) requires a finding that (I) Debtor made a representation "either knowing it to be false or with reckless disregard for the truth"; (2) the misrepresentation was made with the intent to deceive; and (3) the Plaintiff actually and justifiably relied on the misrepresentation.

For a debt to be nondischargeable in Count II under Sec 523 (a)(4), debtor must either have committed embezzlement or klarceny, or had a fiduciary duty established either by an express trust or by a relationship[of special trust and Field v. Mans, 516 U.S. 74-75, 116 S.Ct. 437, 446 (1995); Goldberg Sec. Inc. v. Scarlata (In re Scarlata), 979 F. 2d 521, 525 (7th. Cir. 1992).substantial inequality of power or knowledge and the debt was caused by the debtor's fraud or defalcation in breach of that duty. In re Woldman, 92 F. 3d 546,547 (7th. Circ. 1996); In re Marchiando, 13 F. 3d 1111, 1116 (7th. Cir. 1994). Embezzlement of the kind required to trigger the statutory exception to discharge is the "fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." In re Weber, 892 F. 2d 534, 538 (7th. Circ. 1989).

The same events which were pleaded in Herbstein's Complaint in the District Court provide the factual basis for his contention here that Bruetman's judgment debt is nondischargeable on both counts.

The Complaint in the New York litigation set forth causes of action in five counts for racketeering, fraudulent representations, breach of fiduciary duty, fraudulent concealment and conversion, with respect to the same business venture and history alleged here. In the Racketeering Count (Count 1) of the New York District Court Complaint. Herbstein alleged that he transferred hundred of thousands of dollars to Bruetman "at the specific request and urging of the defendant Bruetman, who falsely and fraudulently represented that said transfers were needed to fund the operations of said business and would be used as part of plaintiff's capital contributions to said business."

Herbstrein alleged further therein that in fact Bruetman "intended to misappropriate monies from plaintiff and from IXC and its predecessor and to use the monies for his own benefit and that of the defendant High Tech." Herbstein further alleged that Bruetman:"falsely and fraudulently represented to plaintiff with all of his capital contributions and never intended to do so." Herbstein futher alleged in that case that Bruetman "engaged in a scheme to defraud plaintiff and IXC and its predecessor by misappropriating monies from IXC and its predecessor and by using those monies for purposes that had nothing to do with the business of IXC or its predecessor and which generally benefited Bruetman, his family or his other companies, High Tech or Altec-2."

The Complaint in the New York litigation set forth causes of action for racketeering, fraud, breach of fiduciary duty and conversion. It alleged a scheme to divest Plaintiff of his money which the District Judge described (in his order and opinion filed June 19, 1992, two month before judgment was entered) as alleging as a three phase operation in which the Defendant (1) extracted money from the plaintiff with false representations that those funds were to constitute capital contributions of Plaintiff to a corporation in which Defendant made an equal investment and which needed the money to purchase equipment and engage in operations, then (2) siphoned off the money through fraudulent bond purchases among other things, and finally (3) used false and falsified documents to divest Plaintiff of his interest in the corporation.

The facts alleged in that case fall well within the meaning of earlier cited applicable Bankruptcy Code provisions setting forth elements for exceptions of discharge.

The Defendants argues that the New York Complaint did not contain allegations of all elements of a nondischargeability cause of action under Sec. 523 (c) (2)(A) for false pretenses, false representations or actual fraud, but he does not specifically point out any missing element. Actually, that Complaint was replete with allegations of false pretenses, false representations and fraud. These appear at those paragraphs of the New York Complaint numbered 13, 14, 15, 19, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 45, 46, 47, 48,49,50, 52, 52, 54, 55, 57, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77. Reliance to the detriment of Plaintiff is set forth at paragraph 113.

The same matters were alleged in this Adversary case, and therefore the "same issue" requirement is met. See Katahn Assoc., Inc v. Wien (In re Wien, 155 B.R. 479, 484 (Bank. N.D. Ill. 1993).

B. Actually Litigated.

Bruetman further contends that the default judgment entered in the District Court litigation was not a result of actual litigation, and therefore there is no collateral estoppel effect. However, Bruetman had a full and fair opportunity to litigate the claims of this Plaintiff in New York from 1989 to

1992. He vigorously participated in those proceedings, with counsel, until he decided to abandon his defense. Then he willfully disobeyed repeated court orders and suffered entry of default judgment.

Default judgments are not generally given preclusive effect under federal collateral estoppel doctrine because the usual default judgment cannot satisfy the "actually litigated" requirement. Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th.Cir. 1994); U.S.v. Bailey, 957 F. 2d 439, 439, 443 (7th. Cir. 1992); Grip-Pak, Inc. v. Ill. Tool Works, Inc., 694 F.2d 466, 469 (7th. Circ. 1982). However, when a defaulting party could reasonably have foreseen the conclusive effect of his action, collateral estoppel may apply to bar relitigation of the issues resolved by the default judgment. Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987).

Many opinions have given preclusive effect to default judgments under facts similar to those presented here where judgments were entered against parties who actively participated in litigation and then were at fault in preventing its resolution. A full trial is not always necessary to satisfy the requirement of actual litigation. La Preferida, Inc. v. Cerveceruia Modelo, 914 F.2d 900, 906 (7th. Cir.1990) See also Wolstein v.Docteroff, 133 F.3d 210 (3d Cir. 1997),(FDIC v. Daily (In re Daily), 47 F.3d 365 (9th Cir. 1995)Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319 (11th Cir. 1995), In re Wien, 155 B.R. 479 (Bankr. N.D.Ill. 1993), Casey v. Transport Life Ins. Co. (In re Dorsey), 1993 WL 340928 (Bankr. N.D.Ill. 1993), The foregoing precedents did not present typical default judgments in which defendants neglected or elected not to participate in the litigation in any way. Rather they were cases in which defendants participated actively and wit full opportunities to present their cases, but then frustrated efforts to bring actions to trail. Courts are reluctant to let such defendants get a second bite of the apple. See Bush 62 F.3d 1326.

The New York District Court decision was not a routine default judgment.

Bruetman answered the Complaint; engaged in extensive discovery; filed, briefed and argued a motion for summary judgment; and participated in preparation of a Final Pretrial Order. Bruetman had notice that a default judgment would be entered against him if he did not comply with the District Court's order to disclose assets and financial conditions. The District Court allowed Bruetman about ten month to comply with repeated orders, at the end of which Bruetman's lawyer wrote a letter to the District Judge acknowledging that a default judgment would be entered against him because his failure to comply.

An affidavit filed by Bruetman here seeks to go behind the record of the New York judgment to show at some length his reasons for not complying in that case with the orders to disclose his financial data. Those asserted reasons involved another piece of litigation and judgment entered against him before a judge of our District Court, and resulting appellate activity in this Circuit. See Philips Medical Systems Int'l B.V. v. Bruetman, 982 F. 2d 211 97th. Cir. 1992) and Philips Medical Systems Int'l B.V. v. Bruetman, 8 F. 3d 600 (7th. Cir.) 1993). Mr. James Mc. Guh, who was his attorney in both the New York and Chicago cases, presented his affidavit he giving reasons for Bruetman's failure to comply with repeated orders of the New York District Judge.

However the District Court Judge in New York found that Bruetman willfully failed to comply with the orders of that Court, and determined that there was no just reason to delay any enforcement of the resulting judgment. That Judge treated Bruetman's refusal to give financial in a case soon to go to trial that include punitive damage claim against him as major interference with Plaintiff's effort to prepare for trail. Such information was directly relevant to the punitive damage issue. Vasbinder v. Scott, 876 F. 2d 118, 121 (2nd Cir. 1992); Brink's Inc. v. City of New York, 546 F. Supp. 403, 413 (S.D.N.Y. 1982); Deborah v. Diorio, 583 N.Y.S. 2d 872, 875 (Civil Court New York County 1992). Efforts now to explain or justify reasons, legal or economic, for refusing the order information are merely a collateral attack on the New York judgment.

The Mc Guh affidavit also stated in what must be considered as his conclusion of law rather than an objective fact that the New York default judgment should be viewed on "as a discovery sanction unrelated to the issues and merits in the case" The conclusion by Bruetman's former counsel that noting factual was determined by the New York judgment must be considered in light of the record earlier discussed, and that counsel's conclusions can hardly dispose of this issue by a conclusory affidavit.

While collateral estoppel and issue preclusion effect may be given to default judgments after litigation in which defendants actively participated, it must first be clear that the resulting judgment necessarily relied on a sufficient factual basis to warrant issue preclusion, and in a nondischargeabilty case the bankruptcy judge must be able to determine what facts were decided In re Wien, 155 B.R. 479, 485 (Bankr. N.D.Ill. 1993). Ordinarily, "[d]etailed findings of fact from earlier proceedings are necessary to enable the bankruptcy court to determine which issues were actually litigated in the earlier proceedings." In re Dorsey, 1993 WL 340928, at * (Bankr. N.D. Ill 1993). When a default judgment has been entered, the record rarely reflects findings of fact sufficient to meet the requirement that the fact issue to be precluded have been actually and necessarily litigated. Id. Preclusive effect can not be given to a default judgment if findings were "conclusory" or the record, pleadings, and affidavits do not enable the other court to discern the factual basis of the judgment and determine what was essential to the award of the default judgment. Id.

The District Judge in the New York Case did not enter either Finding of Fact or Conclusions of Law. The judgment "ordered and adjudged that plaintiff recover jointly and severally of the defendants Martin E. Bruetman, High Tech Medical Parks Development Corp. and Alta Technologia Medica, S.A. the sum of $2,737,924.40 with interest thereon as provided by law, and his costs of this action." While that default judgment did not expressly indicate on its face the manner in which the judgment sum was calculated, from review of the judgment amounts requested by Plaintiff in which he demonstrated how the New York judgment was calculated (as earlier described), it is clear that treble damages were awarded. Because Count I (the Racketeering Count) in the District Court Complaint was the only Count in that case in while treble damages were requested, the New York District Judge necessarily decide in Herbstein's favor on that Count.

Bruetman nonetheless argues that the default judgment was not sufficient to establish facts alleged in the District Court Complaint, and that even if facts were established by the default judgment, such facts would not meet requirements for an exception to discharge under 11 U.S.C. Sec. 523(a)(2)(A) and 11 U.S.C. (a)(4).

A default judgment has the effect of establishing a defendant's liability as a matter of law for each well pleaded allegation of a plaintiff's complaint. Dundee Cement Company v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319 (7th Cir. 1983), In addition a default judgment establishes as matter of law, that the defendant is liable to plaintiff as to each cause of action alleged in the complaint. Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc., 687 F.2d 182 (7th Cir. 1982). See also Brown v. John H. Beuyer, Inc., 1999 U.S. Dist., Lexis 13596 (S.D.N.Y. 1999), citing Au Bon Pan v. Artect, Inc., 633 F.2d 61 (2nd. Dist. 1981); In re Crazy Eddie Securities Litg., 948 F. Supp. 1154, 1160 (E.D.N.Y. 1996) As such the default judgment entered by the New York District Judge on Count I of the New York Case was tantamount to a finding for Herbstein on all allegations and elements pleaded in the Count I Racketeering Count of the District Court Complaint.

The conduct pleaded in the New York case as thus established falls within exceptions to bankruptcy discharge. The purpose of bankruptcy law is to provide a fresh start for honest but unfortunate debtors, not to protect misconduct. Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998)(unconscionable commercial practices sufficient for exception). Even damages for breach of contract may be nondischargeable if acts are committed with intent to cause harm Kawaauhau v. Geiger, 523 U.S. 57 (1998), and certainly may be nondischargeable when coupled with misrepresentation or other fraudulent deceit. McClellan v. Cantrell, 217 F. 3d 890 (7th.Circ.2000)

Indeed, all required elements under 11 U.S.C Sec. 523 (a)(2)(A) and 523 (a)(4) were actually litigated.

1. Count I under Sec.523 (a)(2)(A).

As earlier noted, to bar a debt from dischargeabilty under Sec.523 (a)(2)(A) for false pretenses or false representation, the following must be established: (1) Debtor made a representation "either knowing it to be false or with reckless disregard for the truth"; (2) the misrepresentation was made with the intent to deceive; and (3) the Plaintiff actually and justifiably relied on the misrepresentation. See Field v. Mans, 516 U.S. 74-75, 116 S.Ct. 437, 446 (1995); Goldberg Sec. Inc. v. Scarlata (In re Scarlata), 979 F. 2d 521, 525 (7th. Cir. 1992).

An intent to deceive may logically be inferred from a false representation which the debtor knows or should know will induce another to advance money to the debtor. Carini v. Matera (In re Matera), 592 F. 2d 378 (7th. Cir. 1979); In re Kimzey, 761 F.2d 421, 424 (7th. Cir. 1985). There is rarely direct evidence of the defendant's state of mind at the time of an alleged fraud. Wien, 155 B.R. at 488. Thus , the finding as to the fraudulent intent of the debtor will often have to established by circumstantial evidence. Id.

The reliance necessary to be found under Sec. 523 (a)(2)(A) must be justifiable. Justifiable reliance is an intermediate level of reliance. It is less than reasonable reliance, but more than mere reliance in fact. Field, 516 U.S. 74-75, 116 S. Ct. at 446. The justifiable reliance standard imposes no duty to investigate unless the falsity of the representation is readily apparent. Id. At 71, 116 S. Ct. at 444.

In the Racketeering Count of the New York District Court Complaint, Herbstein alleged that he transferred hundreds of thousands of dollars to Bruetman at Bruetman's specific requite and urging; that Bruetman falsely claim and fraudulently that such transfers were needed to fund operations of a business that Herbstein and Bruetman had created ("IXC"), and that those payments would be used as part of Herbstein's capital contributions. Herbstein alleged further that in fact Bruetman intended to misappropriate monies from Herbstein and from IXC and its predecessor and to use the monies for his own benefit, his family's benefit and that of another company in which Bruetman owned substantial shares and that Bruetman did so.

Those allegations which were deemed to be established when judgment was entered on the Racketeering Count in the New York Case are quite sufficient to meet all three elements required under Sec. 523(a)(2)(A). It was thereby found that Bruetman induced Herbstein to invest money by asserting that the money would be used as part of Herbstein's capital contributions and was needed to fund operations of the business; that Bruetman never credited Herbstein with all of his capital contribution, and never intended to; and that the purpose for Bruetman obtaining the investment from Herbstein was to divert and misappropriate the money for his own benefit, the benefit of his family and the benefit of his companies.

The allegations thereby established and the payments made by Herbstein easily support and inference that Herbstein justifiably relied on Bruetman's false representations. Nothing alleged in those pleadings support a reasonable inference that Herbstein should not have believed and justifiably relied on Bruetman's assertions. Nor were any facts pleaded that would support an inference that was or shall have been apparent that Bruetman would use funds invested by Herbstein for any other purpose other than capital contribution for benefit of their jointly owned company.

Therefore, all elements of Sec. 523(a)(2)(A) were established.

2. Count II under Sec. 523 (a)(4).

As to Count II of the Adversary Complaint here, Bruetman argues that Herbstein cannot meet the elements required under Sec 523 (a)(4) because Bruetman was not acting as fiduciary as required under that provision. For a debt to be nondischargeable under Sec. 523 (a)(40, a debtor must either have committed embezzlement or larceny, or breach a fiduciary duty. In re Woldman, 92 F. 3d 546, 547 (7th. Circ. 1996); In re Marchiando, 13 F. 3d 1111, 1116 (7th. Cir. 1994).

However, it needs not to be determined here that Bruetman was fiduciary because the embezzlement was clearly established. In Sec 523 (a)(4), the term "while acting in fiduciary capacity" does not qualify the words "embezzlement" or "larceny".

Therefore, the discharge exception applies even when the embezzlement was committed not acting as a fiduciary. Green v. Pawlinski (In re Pawlinski), 170 B.R. 380, 390 (Bankr. N.D. Ill. 1994). Embezzlement of the kind required to trigger the statutory exception to discharge is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. In re Weber, 892 F. 2d 534, 538 (7th. Cir. 1989). To establish embezzlement in Count II of this Adversary Complaint, Herbstein must show that Debtor appropriated the subject funds for his own benefit, and did so with fraudulent intent or deceit. Id.

Herbstein alleged in Count I of his New York Complaint that beginning in late 1986 Bruetman, acting in concert with others, falsely and fraudulently represented to Herbstein that all the money Herbstein transferred was needed to fund operations of IXC or its predecessor and would be used as part of plaintiff's capital contributions to IXC and its predecessor Altec-1, whereas Bruetman actually intended to and did in fact misappropriate monies from Herbstein and from IXC and its predecessor for use of the monies to his own benefit and that of his company, High Tech. Herbstein further alleged that Bruetman falsely and fraudulently represented to Herbstein that all of his capital contributions to IXC and its predecessor would be transferred to IXC and credited toward his one-half interest in IXC, whereas Bruetman never credited Herbstein with his capital contributions and never intended to do so. Herbstein further alleged that Bruetman engaged in a scheme to defraud plaintiff and IXC and its predecessor by misappropriating monies from IXC and its predecessor and by using those monies for purposes that had nothing to do with the business of IXC or its predecessor and which generally benefited Bruetman, his family or his other companies, High Tech or Altec-2.

The Defendant Bruetman argues that his only fiduciary duty within the meaning of the Bankruptcy Code was to IXC not to Plaintiff. Even assuming arguendo that to be correct, embezzlement need not be directly from an individual, but might be as funds that someone paid to a corporation employing the perpetrator. Moonan v. Bevilacqua, 53 B.R. 331, 334 (Bank. S.D.N.Y. 1985). Bruetman's own authority agrees. Sims v. Landis, 1997 Bank. Lexis 1214 (N.D.Ill.1997) (embezzlement by employee of medical corporation rendered that employee liable to individual physicians).

Embezzlement was therefore established by the New York judgment.

C. Essential to the Judgment.

Bruetman also argues that no factual determinations were made that were essential to the default judgment, and contends that the only determination essential to the default judgment order concerned his noncompliance with ordered discovery. However, as earlier discussed, entry of treble damage default judgment established the liability on

Bruetman's part under Count I of the District Court Complaint.

The sizeable award of $2,737,924 awarded in the default judgment showed a trebling of damages itemized in the Final Pretrial Order drafted and submitted by counsel for the parties to the District Judge. Because the Racketeering Count I was the only count that requested treble damages, a finding for Herbstein allegations in that count were indeed essential to that judgment. The allegations discussed earlier were included in that Racketeering Count I of the District Court Complaint.

Bruetman's voluminous pro se papers have been read, but his submissions do not contradict what happened in the New York Case and must be given no weight on issues posed here. For example, he tried to show that there were good reasons not to comply with the order to disclose final data, but he may not thereby collateral attack the validity of the judgment. He also notes that his $75,000 cash bond posted by him went to benefit Plaintiff, but that only goes to the question of how to compute the balance now due on the judgment.

All elements of collateral estoppel have thereby been meet.

D. Judicial Estoppel does not apply.

Bruetman argues that some pleadings and statements by Plaintiff's attorney had the effect of judicial estoppel to bar Plaintiff's right to argue collateral estoppel under the New York Judgment.

He contends that Herbstein has taken different legal and contradictory positions in the case. The argument is that Herbstein did not assert collateral estoppel herein under the New York default judgment until after Bruetman had answered and filed counterclaims to the original Complaint and stated discovery.

The doctrine of judicial estoppel provides that a party who prevails on one ground in a lawsuit cannot repudiate the ground in order to have a second victory based on contradictory ground. Ogden Martin Systems of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523 (7th. Cir. 1999.) There is no precise formula guiding application of the doctrine, but there are certain boundaries to it: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first to adopt its position. Levinson v. United States, 969 F. 2d 260, 264-65 (7th Cir. 1992).

The purpose of the doctrine of judicial estoppel is "to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." Levinson, _969 F. 2d at 264-65. The language of the quote from Levinson is telling, and indicates why Bruetman's judicial argument has no merit: no contradictory theories or allegations of Herbstein were adopted earlier in the case nor did any other court do so. Herbstein has not shown to argue different theory or allegation earlier in this or other proceeding in which he has prevailed. Indeed Bruetman does not allege that Herbstein has prevailed in some contradictory way. He simply argues that the earlier and present positions are contradictory. However, inconsistent theories argued in the alternative without success does not call judicial estoppel into issue. Continental Illinois Corp. v. Commissioner of Internal Revenue, 998 F.2d 513, 518 (7th. Cir. 1993).

Moreover, Herbstein has not changed his assertions of what misconduct by Bruetman blocks dischargeabilty of his debt. Rather Plaintiff has now argued collateral estoppel by way of asserting that the earlier pleaded facts have already been established by the New York judgment.

BRUETMAN'S CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II

Bruetman filed a cross motion for summary judgment on Counts I and II of the Adversary Complaint based on doctrines of res judicata and collateral estoppl. He contends that issues asserted in those counts were fully litigated in Argentina and were determined there adversely to Herbstein.

Bruetman's res judicata argument because the Supreme Court has held that res judicata does not apply in bankruptcy discharge exception proceedings. Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205 (1979); Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th.Cir. 1994). Moreover, as discussed below his collateral estoppel argument, because he has not shown a final judgment by an Argentine Court favorable to his position, and for other reasons discussed below.

Bruetman did file affidavits by apparently knowledgeable professionals as to nature and process of Argentine law and other related matters.

Proessor Carno of Buenos Aires University, and visiting professor at Syracuse University Law School, originally submitted an affidavit to the New York District Court in connection to Bruetman's effort in this court to dismiss on comity grounds. Bruetman has resubmitted that affidavit here, in which Carno described the earlier criminal inquiry proceeding then pending under Argentine law and Procedure. However, that affidavit tends to show as of the date of its execution (March 4, 1990) the lack of finality in Argentine proceeding at that date.

Argentine attorney Gorostiza gave an affidavit also filed here by Bruetman. Attorney Gorostiza described the judicial system of Argentine as applied to the proceedings there involving these parties at the time.

Another and more recent submission from Argentine attorney Gorostiza described the Argentine legal system and procedure applicable to the civil proceedings between these parties.

An affidavit by Argentine attorney Anzoategui prepared in 1990 described the role a" private prosecutor:" who seeks to force a prosecution under Aregentine law, evidently offered to explain the Argentine criminal proceeding.

A declaration by Professor Pardo (law professor at National University in Buenos Aires) opined in his 1999 affidavit as to standards finality and res judicata under Argentine litigation cited by him should have such effect.

Bruetman's affidavit authenticated the foregoing affidavits and also copies of the rulings in the Argentine civil proceeding.

The opinion of the New York District Court judge denying Bruetman's summary judgment motion in that Court was also submitted. That ruling found no collateral estoppel effect resulting from dismissal of the Argentine criminal investigation. It reported that both Herbstein and Bruetman had asked to be classified as "victim" under applicable law in that proceeding, but both those petitions were denied and only the corporation IXC was found to be a potential victim. Therefore, neither of the present parties was recognized in the Argentine court as a party to the criminal proceeding and moreover there was no final determination. Bruetman's current motion for summary judgment is an attempt to reargue denial of summary judgment in the New York case, at least to the extent it rested on the earlier Argentine criminal proceeding. Apart from that issue, in denying summary judgment the New York District Judge found a triable issue of fact, and then set about getting the case ready for trial. Bruetman willful non-compliance with repeated orders for discovery into his financial condition relevant to plaintiff's prayer for punitive damages followed, with the result earlier discussed.

Bruetman asks that the asserted Argentine "decisions" in the civil and criminal proceedings there be recognized on the doctrine of comity. As earlier discussed, no final judgment was entered in either case, but even if final Argentine judgment had been entered in the civil case, it would not warrant comity under circumstances presented here.

First, it must be recognized that neither the United States Constitution nor any statute of the United States requires federal courts to give full faith and credit to the judgments of foreign nations. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 32 S. Ct. 309 (1912). However, under the principles of international comity, United States federal courts generally will under some circumstances give effect to judicial acts of courts in foreign nations. See Remington Rand Corporation-Delaware v. Business Systems, Inc., 830 F. 2d 1260 (3rd. Cir. 1987), and Philips Medical Systems Int'l B.V. v. Bruetman, 8 F. 3d 600 (7th. Cir. 1993).

The Supreme Court opinion in Hilton v. Guyot provides the guding principles. Comity is defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143 (1895). Comity "is neither a matter of absolute obligation, on the one hand, nor more of mere courtesy and good will, upon the other." Id.

The criteria for application of the principles of international comity were established in Hilton over a century ago and are as follows:

> The participants were given an opportunity for full and fair trial;
>
> The trial was conducted before a court of competent jurisdiction;
>
> The proceedings followed due citation or voluntary appearance;
>
> The trial was conducted upon regular proceedings;
>
> The trail was under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of this country and those of other countries; and

There was no evidence of (1) fraud in procuring the judgment; (2) prejudice in the country's system of laws; (3) prejudice of the Court; or (4) any other reason why comity should not be observed.

Id., at 123, 16 S. Ct. at 143

This is not the first time that Bruetman has advanced the comity argument. While the District Court case was pending and the Argentine Commercial case was pending, Bruetman moved there for dismissal of the District Court proceeding before a decision has been entered in either Argentine case, based on the doctrine of comity and forum non conveniens. That motion was denied in an opinion by Judge Sweet, the District Court Judge in New York, because he concluded inter alia that the claims in the Argentine case and the New York case were not identical. The Court reasoned that the Argentine Complaint focused on misappropriation of corporate funds while the District Court Complaint did not deal specifically with the alleged misappropriation but alleged that Bruetman fraudulently induced Herbstein to invest in the Argentine ventures. Judge Sweet determined the following:

> [T]he Argentine proceeding is equivalent to a shareholder derivative suit, while the American proceeding is a claim for misrepresentation-two independent causes of actions. In the Argentine suite the corporation stands to gain and Herbstein perhaps only derivatively. In the present suit, it is Herbstein individually who seeks restitution for an alleged wrongdoing.
>
> He denied dismissal.

Bruetman now argues the doctrine of comity before this court relying on Ingersoll Milling Machine Co. v. Granger, 833 F. 2d 680 (7th. Cir. 1987), a case concerning recognition of a foreign judgment based on comity. In Ingersoll there were parallel proceedings, one in Belgium and one in a U.S. District Court. Once a judgment was reached in Belgium, before any judgment was entered in the United States, Granger moved for dismissal of the District Court suit based on the doctrine of res judicata based on the Belgium judgment. The District Court in Ingersoll stayed any further proceedings in the U.S. until the Belgium appellate court issued a final opinion, and ultimately decided that the judgment was entitled to recognition and enforcement.

This case must be distinguished from Ingersoll because there had been no prior U.S. judgments entered in that case. Here, there were contemporaneous proceedings pending in Argentina and the United States. However, unlike Ingersoll, when Bruetman moved to stay or dismiss the case in the U.S. based on comity, that motion was denied. The New York District Court case proceeded with the judgment ultimately enter against Bruetman after extensive litigation. Even if the Argentine civil proceeding had later gone to judgment, a final and valid prior U. S. judgment distinguishes this case from Ingersoll.

Entry of a valid and final U.S. judgment in the New York Court is relevant because in the Restatement (Third) of Foreign Relations Law of the United States (1986) ("Restatement") existence of a valid judgment by a United States Court is an important ground for non-recognition of foreign judgments. See Wilson v. Marchington, 127 F. 3d 805, 810 (9th Cir. 1997) (Restatement identified as providing sound guidance for assessing legal judgments of other nations). Restatement Sec. 482 (2)(e) provides that "A court in the United States need not to recognize a judgment of the court of a foreign state if the judgment conflicts with another final judgment that is entitled to recognition."

So even if a later Argentine judgment had decided the exact issues decided by the District Court judgment, under cited authority, any such Argentine judgment need not be recognize because it would be in conflict with the prior final judgment entered in the New York District Court.

Of course, as earlier noted, it must be emphasized that no judgment was shown to have been entered by any Argentine court for or against these parties disposing of individual claims between them.

Bruetman's argument in support of his cross motion is based partly on the fact that the Argentine cases were filed before the District Court action was initiated and that the criminal case decision which merely dismissed that proceeding was rendered almost two year before the District Court rendered the Default judgment. However, the Argentine criminal proceeding that ended prior to entry of the judgment in New York did not determine a single issue, except to determine that the evidence presented was insufficient to charge anyone with criminal fraud under Argentine law. That decision did not find Bruetman or any other person guilty or innocent of the charges regarding falsified accounting statements or other dealings with Herbstein, and the case was only "temporarily dismissed". The wording of that decision as presented here in Bruetman's motion is pertinent:

> It may be appreciated that the contradictions of both appearers, which could not be clarified even though with the accounting reports [], mean an irretrievable obstacle to continue with the investigation, as it is not possible to detect now the existence of an objectable fact which could be typified as crime resulting in the public action, and as consequence thereof, I believe that there should be a partial pronouncement, as stated by the Prosecutor, waiting for new evidences which could permit to go on with the investigation[]. Therefore, I resolve that this case No. 56171 is temporarily dismissed, in which nobody has been prosecuted due to the investigated crime [].(Emphasis added)

Therefore, no final judgment was entered in that case favoring either party. Such dismissal by the Argentine Court of inquiry was akin to a United States prosecutor deciding not to prosecute until and unless new evidence came to light, a decision hardly having weight like a judgment of acquittal as Bruetman would have it viewed. Even if the temporary dismissal later became final under due to passage of time, such finality would simply end the criminal inquiry, not make final any non-existent fact findings.

The second Argentine proceeding relied on by Bruetman started in August of 1989 when Herbstein filed a Complaint in the Commercial Division of the Argentine court system. That suit requested removal of Directors Bruetman, President of IXC and another Director, and also sought a determination that the wrongfully carried other duties as Directors of IXC. To support that request, Herbstein alleged certain facts asserted to constitute wrongful discharge of duties that were damaging to the corporation (the creation of fictious liabilities, non-existence of the balance sheet, diversion of funds, etc.) The lower Argentine court ruling entered subsequent to the New York judgment took into consideration only of them, the inclusion of non-existent debts in the draft of the Financial Statements for the year ending August 31, 1988. However, it dismissed the financial responsibility claim in which Herbstein has sought personal compensation for damages allegedly fro various action of defendant asserted to constitute corporate mismanagement.

On August 5, 1993 (a year after entry of the New York judgment), the Argentine lower court issued the foregoing ruling in the civil case. Although Plaintiff had labeled his claim as an:"individual action for responsibility", the Court reclassified the action initiated by Herbstein, ruling that the suit was really a shareholder derivative action not an individual action for individual relief. The individual claim was dismissed leaving only the shareholder derivative suit.

The Argentine lower court decided to remove Bruetman and another defendant from their positions as Directors and recommended appointment of a new Board of Directors which was to be entrusted with producing new corporate financial statements. It also ruled that Herbstein had not established his allegations that Bruetman diverted funds from the corporation for payment of expenses on behalf of other corporations that were under his control.

Bruetman and the other defendants appealed the decision of the Argentine lower court. Their appeal was based on the lower court judge's reclassification of the action initiated by Herbstein. The Appellate court reversed the lower court, reasoning inter alia that removal of the directors was not warranted and that the Argentine lower court judge could not modify the Complaint by reclassifying the action as derivative suit. The appallate court ruled that the modification of Herbstein's claim would result in the defendants being deprived of their "defense rights" since the lower court's ruling took place after the defendants had answered the Complaint.

The only determination by the Argentine civil court that conceivable relates to the nondischargeability here was the Argentine lower court's determination that Herbstein had not pleaded a diversion of corporate funds by Bruetman. But that finding (which was not shown here to have been a final judgment), must be viewed as contradicting allegations found to have been established earlier by entry of judgment in the District Court Complaint- Count 1.

For then foregoing reasons, to the extent that any determination by the Argentine court could be found to conflict with the earlier District Court judgment, such determination need not and should not be recognized here. Indeed, parties who litigate to a conclusion in a United States court hardly expect any United States court to effect to a subsequent contrary ruling by a foreign court, and that should not be done here.

CONCLUSION

For reasons stated, Bruetman's cross motion for summary judgment will be denied, and Plaintiff's motion for Summary Judgment on Counts I and II of Herbstein's Adversary Complaint will be allowed. There are no issues of fact preventing entry of summary judgment for Plaintiff, and he is entitled to judgment in Counts I and II as matter of law. Judgment will enter by separate orders in favor of Plaintiff on these counts and status will be set on remaining counts sued on here.

ENTER:

"s/Jack B. Schmetterer"
United States Bankruptcy Judge

Entered this 8th day of March, 2001.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF NEW YORK

---------------------------------------x

DIGO J, HERBSTEIN.

Plaintiff,

-against-

MARTIN E. BRUETNIAN,
HIGH TECHMEDICAL
PARKS DEVELOPMENT CORP.,
RONALD TASH, DOUGLAS
KIELL. MAURJCIO AGUDELO,
AND ALTATECNOLOGIA
MEDICA. SN

Defendants.

---------------------------------------x

89 Civ 6864 (R WS)

FINAL JUDGMENT

This action having been commenced in October 1989, and the defendants having appeared and been represented by counsel; this action having been scheduled for trial on August 10, 1992; the Court having ordered that the defendants Bruetman, High Tech Medical Parks Development Corp. and Alta Tecnologia Medica S.A. produce affidavits and documents concerning their current assets and liabilities by July 23, 1992, and the Court having ordered that judgment by default be rendered against said defendants if they fail to comply wit said order, and the Court having duly found that the Defendants Bruetman, High Tech Medical Parks Development Corp., and Alta Tecnologia Medica, S.A. willfully failed to comply with said order; and the Court having expressly determined that there is no just reason for delay and expressly directed that final judgment against the defendants Bruetman, High Tech Medical Parks Development Corp., and Alta Tecnologia Medica S.A. be entered: it is

ORDERED and ADJUDGED that plaintiff recover jointly and severally of the defendants Martin E Bruetman, High Tech Medical Parks Development Corp., and Alta Tecnologia Medica S.A. the sum of 52,7373,940.40 (handwritten) with interest thereon as provided by law, and his costs of this action.

Dated: New York, New York

August 10 (handwritten) 1992

"s/Sweet"

United States District Judge

Pertinent Excerpts of Bruetman C.R. 56.l(b)(3)(B)(402 N Bkr.) Statement

11. Herbstein Assertion

The court calculated the amount based on the pretrial submission of the Plaintiff, based on actual damages of $655,100.00 trebled under the RICO statute to $1,965,3000.00 plus attorneys fees and expenses in the sum of $610,487.15 plus interest in the sum of $162,137.25 bringing the final judgment to $2,737,924.40.

Bruetman Response

Bruetman, the defendant, agrees that there is no genuine issue as to the fact ordered that Herbstein recover the sum of $2,737,924.40. It is noted that the default judgment is typed, with a blank for the amount, which was filled in by hand, and that the sum is recovered jointly and severally from the three defendants.

Bruetman disagrees that there is no genuine issue as to the remaining facts. The reference relied upon, paragraph 16 of the affidavit of Ronald DePetris, does not support the assertion that the court "calculated the amount of the judgment based on the pretrial submission of the Plaintiff, based on actual damages". The facts are not within affiant's personal knowledge, and the affiant fails to provide any other source for the assertion. (DePetris aff., par. 16). The default judgment order in itself states only a sum, and says noting about the calculation or components of the sum, or an award of actual damages. (DePetris aff., Exhibit, page 2).

Herbstein does not identify the "pretrial submission" upon which he asserts that the amount of the default judgment is based. The supplemental affidavit, paragraph 6, referenced by the assertion, states that, at the time the court entered judgment on August 10, 1992, "the court relied, in part, on paragraph 6(b) of the pretrial order in calculating the damage award". The facts as to what the court relied on in calculating the amount of default judgment are not within affiant's personal knowledge. Further, the assertion states that the court relied "in part", on paragraph 6(b) of the pretrial order. What else the court relied on is not stated nor supported. It is not clear whether the "pretrial submission" refers to the pretrial order, or something else. In addition, the default judgment made no damage award. No damages were determined or awarded. The default judgment simply provided a sum to be recovered jointly and severally. (DePetris aff., Exhibit E, page 2).

Herbstein asserts that interest and "expenses" were components of the default judgment amount. The default judgment order itself states that plaintiff recover the sum written in "with interest thereon as provided by law, and his costs of this action"

Herbstein asserts that the amount of the default judgment is based on actual damages of $655,100.00, treble to $1,965,300.00. The DePitres affidavit referenced asserts that, on the claims set forth in paragraph 6(b) of the pretrial order, "plaintiff seeks damages as follows"

"(1) the smm of $420,100, representing the amount of plaintiff's capital contributions to and investment in IxC by reason of defendant fraudulent conduct;

(2) a sum in excess of $235,000, representing the amount that plaintiff has spent in order to protect his investment in and ownership of IxC by reason of defendants' fraudulent conduct;

(3) the sum of $420,100, representing the minimum value of plaintiff's financial and ownership interest in IxC;

(4) treble the amount of damages stated above, plus the cost of this suit, including attorneys' fees;

(5) punitive damages; and

(6) interest on the above."

One factor is interest, which the default judgment states is not included in the amount. A second factor is punitive damages, which is not mentioned in the default judgment and regarding which the DePetris supplemental affidavit states in paragraph 6: "the Plaintiff did not press for a separate punitive damage award". Herbstein falsely states in paragraph 2 of the Amended Adversary Complaint that the New York District Court "found Debtor liable to Plaintiff for compensatory and punitive damages in the sum of $2,737,924.40" It did neither.

The third factor is "trebled the amount of damages stated above, plus the cost of this suit, including attorneys' fees". The default judgment expressly provides that costs are not included in the judgment amount stated. The DePetris affidavit, paragraph 16, provides no support for the assertion that a certain amount for attorneys' fees was included in the judgment. The final three factors set forth in 6(b) are the amounts "stated above" that are to be trebled: (1) $420,100.00 for "capital contributions" and "investment" made by "by reason of defendants' fraudulent conduct (all the fraudulent conduct alleged against all defendants, as neither the defendants nor the fraudulent conduct is specified); (2) $235,000.00 "in order to protect his investment" spent by Herbstein "by reason of defendants' fraudulent conduct" (again, not specified); and (3) $420,100.00 "representing the minimum value of plaintiff financial and interest ownership interest". Herbstein asserts, "actual damages of $655.100.00 were trebled. Factors (1), (2) and (3) total $1,075,200; and factors (1) and (2) and factors (2) and (3) total $655,100.00."

It is noted that on August 17, 1992, the court ordered that the sum of $75,000.00 deposited by the defendants as security for costs and being held in the registry fund of the court be applied to the judgment amount and that the clerk of the court disburse the money to Herbstein' s attorneys, which was done. (DePetris aff. Exhibit B, page 12, # 120).

Additional Facts oursuant to C.R.56.1 (b)(3)(B)

1. At the time that Herbstein filed the adversary complaint, Rule 9011 of the Federal Bankruptcy Rules was in effect. That rule provided, in subdivision (b), in part, that an

attorney, by presenting a pleading to the court, "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances", "(2) the claims, defenses and other legal contentions therein are warranted by existing law or by non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law", and "(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

2. On October 4, 1999, Herbstein filed a five count amended adversary complaint, alleging in paragraph 2 that the debt of Bruetman to Herbstein "is evidenced by a judgment of the United States District Court for the Southern District of New York" in which "that Court found the Debtor liable to Plaintiff for compensatory and punitive damages in the sum of $2,737,924.40"(Record)

12. The New York court did not find Bruetman liable for compensatory and punitive damages. (N.Y.8/10/92 dflt. jdgmt.; DePetris supp. aff., par 6).

13. The amended adversary complaint no allegation concerning the New York proceeding other than in paragraph 2. (Record).

16. The New York complaint contained five counts. Count I asserted a claim of racketeering (pars. 1-107) and sought damages in the amount of $557,000 to the trebled under the RICO statue, against all the defendants. Count II asserted a claim of breach of fiduciary duty (par. 1-77, 108-110) against Bruetman as president, director, and chairman of an Argentine corporation, Imagenes por Computacion, S.A. (IxC), which ran a sophisticated medical diagnostic center in Buenos Aires, by Herbstein, 50% shareholder, officer, and director of the corporation, for in excess of $500,000 plus punitive damages of $1,000,000. Count III asserted a claim of fraudulent representations (pars. 1-77. 111-113) against all

defendants, for in excess of $500,000 plus punitive damages of $1,000,000. Count IV asserted a claim of fraudulent concealment (pars 1-77, 114-116) against Bruetman, for in excess of $500,000 plus punitive damages of $1,000,000. Count V asserted a claim of conversion (pars 1-77,117-119) against all defendants, for in excess of $500,000 plus punitive damages in excess of $1,000,000. (N.Y. cmplnt.)

26. In the New York proceeding, the issues to be tried as formulated by the court with the consent and agreement of the parties were set forth in the Final Pretrial Order as follows:

(a) Did the defendants Bruetman, High Tech, Tash, Agudelo and Altec-2 knowingly and willfully conduct and participate in the conduct of the affairs of IxC and its predecessor through a pattern of racketeering activity, including mail fraud and wire fraud?

(b) Has plaintiff been injured in his investment in and ownership of IxC by reason of defendants' fraudulent conduct?

(c) Did defendant Bruetman breach his fiduciary duties?

(d) If so, has such breach caused damage to plaintiff?.

(e) Did the defendants Bruetman, High Tech, Tash, Keill, Agudelo, and Altec-2 knowingly and intentionally make false and fraudulent representations to plaintiffs and others concerning financial matters relating to IxC, including capital contributions to and plaintiff s financial and ownership interest in IxC?

(f) Did plaintiff and others rely on these representations to plaintiff's detriment?

(g) Did the defendant Bruetman conceal and willfully fail to disclose material facts concerning financial matters relating to IxC from plaintiff with the intent to deceive plaintiff?

(h) Did such conduct cause damage to plaintiff?

(i) Did the defendants Bruetman, High Tech, Tash, Keill and Agudelo wrongfully convert money and property?

(j) Has plaintiff been damaged as a result of such conversion?

(N.Y. PTO pages 38-39. sec 8.)

27. In the New York proceeding, the action was schedule for trial on August 10,1992 (N.Y. 8/10/92 order). No issues, facts, evidence, or contentions were agreed, consented to, stipulated, admitted, found, concluded, or submitted to the court for determination, adjudication, or decision at any time; no exhibits or deposition testimony was submitted to the court at any time, in connection with Herbstein's claims, with the exception of submissions made in connection with the defendants for summary judgment motion. (N.Y. docket PTO).

31. In the New York proceeding, regarding certain arguments made in the joint motion for summary judgment on the merits, the court held that "multiple questions exist", there were "many questions of fact" and "inferences arising from them", that one argument "borders on frivolous", that "Herbstein has not submitted much evidence in support of his argument" on one issue, but the defendants "have failed to provide any evidence that would entitle them to judgment as matter of law", and that the "joint motion for summary judgment is therefore denied in its entirety" (N.Y. 8/19/92 order, pages 12-15).

37. In the New York proceeding, pursuant to the protective order, Bruetman and High Tech provided Herbstein's counsel with statements of their current financial condition by letter dated January 15, 1992. (N.Y. 2/27/92 DePetris letter, page 2).

In the New York proceeding, the defendants provided affidavits as to their current financial condition by letter dated February 17, 1992. (N.Y. 2/27/92 DePetris letter, page 2).

40. Bruetman stated in his affidavit that the financial information was true and correct to the best of his knowledge

and understanding, that the documents on which he based his statement were bank records and financial statements, and that he valued the real estate on current prices of similar condominium units and not on a formal appraisal. (N.Y. *2/12/92* Bruetman affidavit, paragraph 3, 4 6.)

41. In the New York proceeding, on June, 1992, the court entered an order sealing and impounding the affidavits and financial statements. (N.Y. docket page 11, # 115).

60. In the New York proceeding, on August 19, 1992, the court ordered that a request for international judicial assistance be issued requesting the appropriate judicial authority in Argentina to proceed to the execution of the default judgment. (N.Y. docket page 12, #121).

The request for international assistance was referred to the civil division of the courts of Argentina, which referred to the Commercial Division. The latter denied the enforcement request, "in limine" on the basis that Argentina does not enforce default judgments from other jurisdictions. Herbstein's attorney requested that all the documentation be returned to him to returned to the United States Court. (Bruetman aff.)

U.S. Constitution Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. SECTION 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. SECTION 1291

The court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United shall be limited to the States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and 1295 of this title.

28 U.S.C. SECTION 1334(b)

Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Restatement (third) of Foreign Relations Law of the U. States (1982) Sec. 482 (2)(e)

A court in the United States need not to recognize a judgment of the court of a foreign state if the judgment conflicts with another final judgment that is entitled to recognition."

Federal Rules of Civil Procedure. (pertinent)

Rule 11(b)

Representations to Court: By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances. —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a no frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have....

Federal Rules of Civil Procedure Rule 56(c)

Motion and Proceedings Thereon. The motion shall be served at least 1 0 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred in an affidavit shall be attached thereto or served therewith

Circuit Rule 56.1 Motions for Summary Judgment.

(a) Moving Party. With each motion for summary judgment filed pursuant to Fed. R. Civ. P. 56 the moving party shall serve and file....

(b) (3) a statement of material facts as to which the moving party contends there is no genuine issue and tat entitle the moving party to a judgment as matter of law, and that also includes:

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting material relied upon to support the facts set forth in that paragraph. Failure to submit such statement constitutes grounds for denial of the motion.

If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts forth in the statement filed pursuant to section (b)(3)(B) will be deemed admitted unless controverted by the statement of the moving party Applications' Sect. 12-618 through 12-626 of this Act apply to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal there from is pending or it is subject to appeal.

IL. ST. CT-I 735 Sec. 5/12-620 (formerly 110 Sec. 12-620)

Conclusive and enforceable. Except as provided in Section 12-621 of this Act, a foreign judgment meeting the requirements of Section 12/619 of this Act is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full and credit.

11 U.S.C. Sect. 727 (a) (pertinent) "The Court shall grant the debtor a discharge, unless"

...(10) (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of discharge order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 502 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C 523: Exception to Discharge.

523 (a) "A discharge under section 727,....of this title does not discharge an individual debtor from any debt--- under section (2)(A) and (4)."

(2) for money, property, services or an extension renewal, or refinancing of credit, to the extent obtained by—

(b) Opposing Party. Each party opposing a motion filed pursuant to Fed. R. Civ. P. 56 shall serve and file

(3) a concise response to the movant's statement that shall contain:

(A) a response to each numbered paragraph in the moving party's statement including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and

(B) a statement, consisting of short numbered paragraphs, of additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

Federal Rules of Civil Procedure. Rule 69 (a) Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

ILL. St. Ch 735 Sec. 5/12-619 (formerly 110Sec. 12-619)

(A) false pretenses, a false representation, or actual fraud, other than s statement respecting the debtor as or insider' s financial condition;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny

Federal Rules of Bkrt. Procedure

Rule 4004 (b) Extension of time. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time expired.

Federal Rules of Evidence.(Pertinent)

Article II. Judicial Notice

Rule 201 Judicial Notice of Adjudicative Facts

(a) Scope of rule. – This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts – A judicially noticed fact must be one not subject to reasonable dispute in that is either (1) generally known to the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination to sources whose accuracy cannot reasonable be questioned

(c) When discretionary. – A court may take judicial notice whether requested or not.